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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)** OF THE 439th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 10 June 1991, at 10.30 a.m.

Temporary Chairman: Mr. BERGSTEN (Secretary of the Commission)

Chairman: Mr. SONO (Japan)

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* No summary records were issued for the 426th to 438th meetings.

** No summary record was prepared for the rest of the meeting.

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READEX FICHE

The discussion covered in the summary record began at 11.10 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 1

1. The CHAIRMAN suggested that the Commission should proceed immediately to a detailed discussion of the draft Model Law taking it article by article, and should touch upon general policy issues only in so far as they related to specific provisions in the text.

2. Mr. BURMAN (United States of America) said that, although his delegation agreed in principle with the footnote to article 1 of the draft Model Law, it had proposed an amendment to that footnote for the purpose of clarifying issues which were currently obscure. It was unclear, for instance, whether the existing text of the footnote meant that the draft Model Law applied to consumers unless the internal laws of a particular State otherwise governed the transaction. Furthermore, in its current form, the footnote gave no indication whether, in cases where the consumer-protection laws of a State conflicted with provisions in the draft Model Law in some respects only, the draft Model Law would apply to parts of a credit transfer and the State's consumer-protection laws to other parts of the transaction.

3. As for his delegation's concerns about article 1(1), he preferred to postpone discussion of the matter until various other relevant provisions had been discussed.

4. The CHAIRMAN said that it had not been the intention of the Working Group on International Payments to restrict the scope of consumer-protection legislation to the extent advocated by the United States amendment, i.e. to transactions between the originator and the originator's bank, on the one hand, and between the beneficiary and the beneficiary's bank, on the other.

5. Mr. IWAHARA (Japan) said that the proposed amendment to the footnote to article 1 might give rise to difficult questions of policy in individual States. In article 16, paragraphs 1 and 5, and elsewhere, the draft Model Law dealt with the liability relationship between parties not engaging in direct transactions with one another. If countries were forbidden to enact special regulations concerning such liability relationships for the purpose of protecting consumers, that would discourage them from adopting the draft Model Law. If local consumer-protection laws governing relationships between the originator and receiving banks other than the originator's bank or between the beneficiary and sending banks were to be forbidden, then the Model Law should itself provide for consumer protection, an area which he understood had been expressly excluded from its scope.

6. Mr. GRIFFITH (Observer for Australia) said that there was no need to amend the footnote to article 1 since, as it stood, it clearly indicated that a State's consumer-protection laws should indeed apply to parts of a credit transfer transaction and the draft Model Law to other parts.

7. Mr. DUCHEK (Observer for Austria) said he shared the doubts expressed by the representatives of Japan and Australia. The applicability of national consumer-protection laws should not be diminished by the operation of the Model Law; States adopting the Model Law, or acceding to a convention if the Model Law should take that form, must be able to enact their own consumer-protection laws as they deemed necessary and apply them to international credit transfers. The matter contained in the footnote might better appear somewhere in the text of the articles themselves so as to make it clear that consumer-protection laws would not be affected.

8. The proposed amendment would seem to indicate that the consumer-protection laws of a State should prevail, as far as the relationship between the originator and the originator's bank was concerned, only if the two parties were situated in the same State. However, that might not be the case and, according to private international law, the law of the consumer's State was decisive. Since the amendment would thus appear to run counter to the trend of private international law, he had some technical reservations. A further problem concerned the relations with third parties, which might also be regulated by consumer-protection law.

9. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the text of article 1 should be left as it stood in the Model Law.

10. Mr. ERIKSSON (Observer for Sweden) said that the footnote to article 1 should be left unchanged. Adoption of the amendment would lead to serious problems in the matter of the protection of consumers. There would, for instance, be a number of difficult questions in the event that more than one bank in the chain of transactions was situated in a country with special consumer protection rules, where the consumer was also located.

11. As for the question of a conflict between the Model Law and the consumer-protection laws of a particular State, it was quite clear that, unless there were special consumer-protection regulations in the country concerned that dealt with the specific problem, it would be resolved according to the rules contained in the Model Law.

12. Mr. BURMAN (United States of America) said that the will of the Commission seemed to be clear; however, with regard to the subject under discussion and to other articles it had yet to consider, he hoped that there would be general agreement that the fundamental purpose of the Commission was to facilitate international trade by removing the impediments created by conflicting national provisions and, perhaps, by establishing special international rules. The interests of consumers had, of course, to be taken into account. In view of the difficulties created by uncertainty as to what laws would apply to a given commercial transaction, his delegation considered that it was the Commission's task to create predictability and certainty for the commercial parties. That aspect would, he hoped, be taken into account as the Commission's work proceeded since such an approach would result in great benefits to all the Member States.

13. The CHAIRMAN, having thanked the representative of the United States for his co-operative and constructive attitude, said that, although his amendment was not generally accepted, there was a feeling in the meeting that the protection of consumers was important.

14. The United States proposal was also related to the sphere of application of the article - whether it should cover only international transactions or both domestic and international transactions. In the latter case, he assumed that the delegation of the United States would prefer that certainty be maintained, both the beneficiary side and the originating side being subjected to local autonomy, and would agree that the protection of consumers should fall under local jurisdiction. Even if it were thought that certain segments of the total transaction should be excluded from consumer protection, that principle could not be imposed through the Model Law. It was clear that the aim should be to create certainty in the legal relationships involved in the credit transfer system.

15. The footnote, as currently drafted, was the result of a long debate. It was a neutral statement of a fact and was not intended to encourage local intervention. In the circumstances, he hoped that the United States representative would not insist on his amendment.

16. He had noted the suggestion by the observer for Austria that the matter contained in the footnote be included in the actual text of the Model Law, but hoped that the suggestion would not be pursued.

17. Turning to article 1(1), he noted the United States proposal to make the Model Law applicable to both the domestic and the international parts of credit transfers. While the comments he had heard indicated that such an approach might not attract much support, it should none the less be understood that expansion of the scope of the Model Law would not necessarily be excluded.

18. Mr. BHALA (United States of America) said that he agreed with the Chairman's thinking. In the case of the test for internationality, it might not be possible to solve all the difficulties at the current session. The division of a credit transfer into an international part and a domestic part raised both conceptual and operational difficulties. Any such test was bound to be formalistic and might therefore be either under-inclusive or over-inclusive.

19. In fact, the test as currently worded might be the best that could be expected. He would, however, like to see the matter discussed in the commentary on the draft Model Law which would, he hoped, reflect his delegation's concerns.

20. Mr. SCHNEIDER (Germany) drew attention to a problem concerning the Member States of the European Economic Community. The intended creation of a single internal market would eliminate the distinction between cross-border and domestic transactions within the Community. The possibility of issuing an EEC directive incorporating the Model Law was under discussion. In that event, all transfers within the Community would be subject to the Model Law.

(Mr. Schneider, Germany)

21. Secondly, although the Working Group had noted the global nature of international payments, national laws still existed and it was desirable that they should continue to do so. It was therefore necessary to decide whether a chain of contracts should be governed by a single law, or whether different parts of the chain should be governed by different laws. However that might be, it was by no means unlikely that full harmonization would not be achieved because some countries would, unfortunately, decide not to adopt the Model Law. As it was possible, therefore, to deal only with specific parts of the chain, he preferred to retain the existing text.

22. The CHAIRMAN suggested that, in respect of internal European Economic Community rules, an approach might be adopted similar to that in the 1980 United Nations Convention on Contracts for the International Sale of Goods which stated (article 94) that two or more contracting States having the same or closely related rules might be excluded.

23. Ideally, as advocated by the representative of the United States, international transfers should be governed by global rules. For the time being, however, as the representative of Germany had pointed out, national laws predominated. Those two views did not necessarily reflect a contradiction in philosophy but simply constituted different approaches to current realities.

24. He assumed that the Commission would adopt the approach of distinguishing between international and domestic transfers, as clearly implied in article 1(1). As indicated in the Secretariat's comments on the article (A/CN.9/346, pp. 6-9), States would still be free to extend the scope of the Model Law by applying it to international and domestic transfers.

25. Mr. GRIFFITH (Observer for Australia) said he agreed that there should be an option of applying the Model Law to domestic transfers. It might be useful if that idea were included in a footnote or commentary to the Model Law, so that those persons not attending the session of the Commission might become aware of it.

26. Mr. VASSEUR (Banking Federation of the European Community) said that the members of his Federation would wish the Model Law to apply solely to electronic credit transfers. He shared the concern of the representative of the United States arising from the significant differences between low-cost, high-speed electronic credit transfer systems and other methods of transfer involving telex, documents and the like. The Working Group had decided not to make any distinction but had suggested that, if necessary, special rules for non-electronic transfers could be drawn up. He asked for confirmation that the current text, which made no distinction between the different types of transfer, was intended to apply to all transfers of funds.

27. The CHAIRMAN said that, although the Working Group had, at one stage, concerned itself only with electronic credit transfers, it had come to realize that most of the rules would apply to all types of transfer of funds. It had therefore considered the application of the rules to all transfers of funds.

(The Chairman)

Nevertheless, it was only because of the development of electronic credit transfer systems in the 1970s that the current draft Model Law had been developed. However, since it was a Model Law, Member States were perfectly free to adopt it for electronic credit transfers only.

28. Mr. ABASCAL ZAMORA (Mexico) said that the restriction to electronic credit transfers had been eliminated for various reasons. In the first place, it was difficult to distinguish between electronic and other types of transfer since, in practice, a transfer might be made in part electronically and in part by other means. It has also been thought desirable to eliminate any preference for a particular type of technology, which might preclude other forms to be developed in the future. High-speed electronic credit transfers were extremely difficult to define. It had therefore been decided that the draft Model Law should cover all transfers of funds.

29. Mr. BURMAN (United States of America) said that since the issue of the distinction between electronic fund transfer (EFT) and all other forms of transfer had been raised, he had some general comments to make, even though the subject had been discussed in the Working Group.

30. The Working Group had taken on an extremely difficult task and the ultimate fruit of its labours might prove unacceptable in practice to the commercial community if the Commission insisted on trying to combine two very different types of transactional environments which would be better served by two different sets of rules.

31. The question was not just one of speed, like, for example, the difference between a motor car driving along a motorway and a bicycle proceeding slowly and steadily with time for checking, notifying and so forth. What really distinguished electronic banking from the traditional banking world was the extremely high volume made possible by computer-assisted international banking, which had created a very different environment for the transfer of credits. Combining all those aspects in a single instrument - as the Working Group and the Commission appeared to be doing - seemed less practical than attempting to produce separate rules for the different types of transaction.

32. The members of the Commission and of the Working Group might bear in mind, however, when distinguishing the environment of high-volume computer-assisted transactions, that there might be links in the chain that used paper, telex, fax and, indeed, human messengers - there might still be room for human beings in the banking system. Nevertheless, a distinction had to be made between electronic and non-electronic banking.

33. A fundamental change had occurred in electronic commerce generally, not merely in credit transfers, and the role of the central data manager was vital. The fund transfer system should be seen as a new, important and centrally involved party. A variety of elements in a transaction might have been undertaken in media other than electronics and the high volume of transactions often caused a variety of legal relationships to change. The Commission might wish to return to the fund transfer system as to a focal

(Mr. Burman, United States of America)

point that, in the long run, changed a great deal in the relations between a variety of banking participants and ultimately the originators of the transactions at one end and their beneficiaries at the other.

34. Mr. KOMAROV (Union of Soviet Socialist Republics) said that, in his delegation's opinion, there was no need nor any good reason to revise the consensus reached in the Working Group. Since, however, questions of interpretation had arisen, it might be advisable in the interests of clarity to state clearly - in article 2(b) concerning payment orders - that the provision in question applied to all types of payments made by teletransmission or electronic transmission.

35. Mr. SCHNEIDER (Germany) said that his delegation shared the United States representative's concern about the problems connected with electronic fund transfers. In his delegation's view, high-volume and inter-bank payments were problems of codified law and might be dealt with by special contracts. The Commission should realize that it was dealing with a very broad sphere of application; it would have to take into consideration the fact that there were still paper-based payment orders and it would also have to deal with consumer transactions.

36. In that connection, he said that it was not completely clear from his country's comments, especially the second subparagraph of paragraph 15 (A/CN.9/347, p. 31), that the Model Law should apply to consumer transactions but that national consumer law would amend the Model Law. He suggested that the insertion of the word "also" or "too" in the last clause of that subparagraph would remedy the situation. The inclusion of consumer transactions should be taken into consideration throughout the text. It was important, also, that the question of freedom of contract should be considered.

37. The CHAIRMAN said that the last subject mentioned would come up under article 3. In that connection, he drew attention to the Secretariat's comments on article 3 (A/CN.9/346, p. 25, para. 3).

38. Mr. LIM (Singapore) suggested, with reference to article 1(2), that, if the reference in the second line was to separate branches of the same bank in different States, the word "a" should be replaced by the words "the same".

39. Mr. BERGSTEN (Secretary of the Commission) said that the text as drafted was intended to refer to a single bank. If the proposed amendment would make the intention clearer without changing the substance, it would be a drafting matter. It might also facilitate translation into other languages.

40. The CHAIRMAN said that, while the Commission might wish to adopt that approach in respect of article 1, it should not be forgotten that article 2 contained other provisions concerning branches and offices of banks, while other articles also might be relevant.

Article 2

41. Mr. BERGSTEN (Secretary of the Commission), referring to the Secretariat's comments on article 2(a) (A/CN.9/346, pp. 12-13, paras. 4-9) reminded the Commission that there had been some problems of interpretation in the Working Group over the question whether certain credit transfers were international or not. In the case, for example, of a United States dollar transfer between two banks in the United Kingdom, one way of making the transfer would be for a payment order to be sent from bank A to bank B, both in the United Kingdom, for the credit of the account of the beneficiary; to reimburse bank B, bank A would then send a separate payment order to its correspondent bank in New York to credit the account of bank B; and bank B would receive the funds from bank A by credit to its account in New York. The direct payment order from bank A to bank B would remain within the United Kingdom and no payment order would cross a boundary from one State to another.

42. The transaction in question could be described in two ways. On the one hand, it could be argued that the reimbursement was a separate transaction which would clearly fall under the current text of the Model Law, while the payment order - or the bank A to bank B transaction - was strictly domestic in the United Kingdom. Conversely, it could be argued that the entire set of operations was a single transaction, namely, a credit transfer from bank A or its customer to bank B, part of that credit transfer being the reimbursement, which included a payment order passing from London to New York. According to the latter interpretation, the payment order from bank A to bank B in the United Kingdom would be governed by the Model Law, on the assumption that the United Kingdom had adopted the Model Law with its article 1 as currently drafted.

43. The CHAIRMAN said that the matter raised by the Secretary of the Commission would be discussed in connection with the second sentence of article 2(a) and, depending on the outome of that discussion, the Commission might have to return to article 1.

The meeting rose at 12.30 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 440th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 10 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 2 (continued)

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that article 2 of the draft Model Law (A/CN.9/344, annex) began with some introductory words which he assumed there was no need to discuss. He would therefore invite comments on subparagraph (a). A point that had been raised by the Secretary at the previous meeting and that required discussion was whether a reimbursement relationship was to be regarded as part of the credit transfer referred to in the subparagraph.

2. Mr. FUJISHITA (Japan) said that the issue seemed to be a complex one. On the basis of comments received from business circles and experts in Japan, his delegation felt that the reimbursement relationship should be excluded from the definition. He wished to draw attention in that connection to the comments of the Secretariat on article 1 in document A/CN.9/346 with regard to the question of the internationality of a transfer. As had been pointed out, if a reimbursement relationship was regarded as included in a credit transfer, the fact that the reimbursing bank was located in another country would cause the whole series of operations constituting the transfer to be covered by the Model Law; the originator or the beneficiary might, however, be unaware that the transfer would be regarded as an international credit transfer, and that might be prejudicial to their interests. According to banking practitioners in Japan, the reimbursement relationship was regarded as something quite different from the chain of operations constituting the credit transfer; to include the reimbursement relationship in the definition might therefore cause confusion. Accordingly, his delegation proposed that the reimbursement relationship should not be regarded as part of the original credit transfer but be considered to constitute a distinct credit transfer transaction.

3. If that point was accepted, the actual drafting was less important. His delegation would not insist on the deletion of the second sentence of article 2(a) as proposed in the second paragraph of Japan's written comments on that portion of the text (A/CN.9/347, p. 35), provided that an amendment was made to article 2(h) on the lines proposed there.

4. Mr. GREGORY (United Kingdom) associated himself with the previous speaker's remarks. He considered that, in the example that had been given by the Secretary at the previous meeting, the payment order to the reimbursing bank in the United States should be treated as separate and not as making the original credit transfer international. The present draft did not make clear whether a reimbursing bank would count as an intermediary bank. However, he thought that the second sentence of article 2(a) was useful and could be left as it stood; when the Commission took up subparagraph (h), it could make clear there that a reimbursing bank was not an intermediary bank.

5. Mr. ABASCAL ZAMORA (Mexico) supported the United Kingdom representative's comments. It was true that divergent views had been expressed on the subject in the Working Group on International Payments, but he thought that the

(Mr. Abascal Zamora, Mexico)

prevailing view had been that the reimbursement operation would not be part of the credit transfer. The order to a reimbursing bank should, he thought, be regarded as something separate.

6. Mr. VASSEUR (Banking Federation of the European Community) said he thought that in the United Kingdom the situation might be a special one, since clearing agreements existed there which did not exist in other countries. In any case, the subject under discussion related rather to article 1 than to the definition of the term "credit transfer". The wording of article 1(1) had been deliberately broadened; he thought that the current wording would make the Model Law apply where, although the originator's bank and the beneficiary's bank were in the same country, the currency used was that of another country.

7. Mr. BHALA (United States of America) said that his delegation supported the present drafting of the first two sentences of article 2(a). It did not consider that so-called reimbursement relationships should be specifically excluded from the definition. There were some credit transfer systems that were based on simultaneous message and payment, and those might then fall outside the sphere of application of the Model Law. The "credit transfer" definition was a key one and his delegation would be against deletion of the second sentence. It must be made clear that a credit transfer consisted of a series of payment orders.

8. Mr. GREGORY (United Kingdom) said he did not think that the point raised by the Secretary had anything to do with a particular practice existing in the United Kingdom, as the representative of the Banking Federation of the European Community had suggested. The situation described could arise with any two countries. He also wished to make it clear that his delegation was not suggesting the exclusion of reimbursement operations from the effects of the Model Law; the point was merely that in the case described the reimbursement operation would constitute a separate transfer. It would unnecessarily complicate the Model Law to attempt to treat reimbursing banks as intermediary banks.

9. Mr. SCHNEIDER (Germany) said that his delegation was in general agreement with the view expressed by the United Kingdom delegation that the basic credit transfer and the reimbursement were two credit transfers, and that one might be international, and therefore covered by the Model Law, and the other national.

10. A problem arose from the fact that, with the draft as it stood, a "credit transfer" meant the whole series of operations, and if any part of it was international the whole series became international. But where the originator's bank and the beneficiary's bank were in the same country, how could they foresee that the transfer would become an international transfer? The earlier text of article 1, adopted at the Working Group's twentieth session (see document A/CN.9/329, annex), spoke of the Model Law applying "where the originator's bank and the beneficiary's bank are in different States". The new draft raised problems.

11. The CHAIRMAN noted that the point just raised was discussed in paragraph 11 of the Secretariat's comments on article 1 (A/CN.9/346, p. 9).

12. Mr. PELICHET (Hague Conference on Private International Law) said that, in its written comments on article 2(a) (A/CN.9/347, p. 71), the Permanent Bureau of the Hague Conference proposed that the second sentence of article 2(a) should be deleted, but for different reasons than those given by the delegation of Japan. The Permanent Bureau considered that, when a link in the chain was international, the Model Law should apply to the whole transfer. The second sentence of the draft was not only unnecessary but presented a danger, because with it a court might interpret the sphere of application of the Model Law restrictively. It might be possible to find a different wording that would make the matter clear.

13. Mr. HUANG Yangxin (China) said that, with regard to the question of the reimbursement operation, his delegation agreed basically with the comments of the United Kingdom delegation. But there might be a still more complicated situation: bank A might ask bank B in the same country to reimburse bank C in the same country, but bank B might credit bank C through a bank in another country. The relationship between banks A and B should then be treated as domestic. It would be hard to ask bank A, in such a case, to accept the application of the Model Law.

14. Mr. BHALA (United States of America) suggested that, in the interests of ensuring wide acceptance of the Model Law as a viable legal instrument in the international commercial world, the text of the first two sentences of article 2(a) and the definition of an "intermediary bank" in article 2(h) should remain as drafted, since they covered all the different concerns raised with regard to cases in which payment orders and payments were simultaneous and those in which they were not.

15. The CHAIRMAN said that one reason for the proposal to delete the second sentence of article 2(a) was that it might imply that the reimbursement situation, which from some points of view might be regarded as involving separate transactions, was to be included in a credit transfer. As a corollary to that it had been suggested that the definition in article 2(h) might be modified by adding the words "that receives and issues payment orders" at the end of subparagraph (h). However, it had been agreed that the second sentence of article 2(a) was important in that it complemented the definition of an "intermediary bank". If the Commission decided to exclude the reimbursement situation from the chain of credit transfers, treating it instead as a separate transfer, it might ask a drafting group to try to find wording to that effect. He suggested that the second sentence of article 2(a) might be improved if alternative wording was found for the phrase "intended to carry out".

16. Mr. BURMAN (United States of America) said that his delegation would reserve its position on subparagraph (a), since it was still reviewing the implications for simultaneous settlement systems such as that of the Federal Reserve Bank.

17. Mr. FUJISHITA (Japan) said that it was his impression that the majority favoured excluding the reimbursement situation from the original credit transfer transaction. Given that assumption, a flexible approach could be adopted with regard to the wording of subparagraphs (a) and (h) of article 2.

18. Mr. SCHNEIDER (Germany) said that problems would arise in situations where both the originator's bank and the beneficiary's bank were in the same country and where there was only one intermediary bank in another country. It would be difficult to define the rights and obligations of the originator in such circumstances. In the case of revocation, for example, how was the originator's bank to ascertain its rights when different rules applied to domestic and international payments? It was important in such cases to know whether the transaction was or was not international.

19. Mr. ABASCAL ZAMORA (Mexico) said that the issue just raised by the representative of Germany had been discussed at length in the Working Group. Two schools of thought had emerged: the first had been that the application of the Model Law should be as broad as possible, while the second had been that provision must be made for the case in which two banks within one country wished to establish whether a third bank intended to invoke the internationality of a payment order in completing a credit transfer. No solution to that problem had been found in the Working Group, but it would probably not prove to be of major practical significance.

20. Mr. SCHNEIDER (Germany) said that the problem would in fact prove significant because the developing internal market in the European Community would give rise to many transactions of the kind he had mentioned.

21. The CHAIRMAN said that article 94 of the United Nations Convention on Contracts for the International Sale of Goods might be a relevant model for States to use when adopting the Model Law to establish cases to which the Model Law would not apply when the States concerned in the transfer had similar rules on credit transfers.

22. Mr. SCHNEIDER (Germany) said that a situation he had specifically in mind was where the originator's bank was a branch of an international bank in State A, the beneficiary's bank was also in State A and the originator's bank executed the originator's payment order by sending a payment order to its main office in State B. In the European Community that type of transaction would be encountered frequently, but it could also arise more generally in international commercial relations.

23. Mr. GREGORY (United Kingdom) said that the problem of reimbursement to banks could be solved by amending the phrase "intended to carry out" in article 2(a). The first sentence of the subparagraph might have to be changed as well in order to dispose of the ambiguity inherent in the term "series of operations", which might be held to include the transaction of reimbursement. The second sentence was not intended to stand as a definition in its own right, but rather to explain the content of the first; it would therefore be best to combine the two sentences by deleting the full stop after the word "beneficiary" and replacing it by the word "but".

24. The CHAIRMAN pointed out that the United States had already proposed, in its written comments on article 2(a) (A/CN.9/347/Add.1, p. 11), that the expression "series of operations" should be replaced by the words "series of payment orders". The precise wording of article 2(a) could perhaps best be left to the drafting group.

25. Mr. PELICHET (Hague Conference on International Private Law) said that even if the wording was referred to a drafting group, it should be clearly understood that if a single segment of a transfer operation was international in character the entire credit transfer would fall within the scope of the Model Law. Article 1 did not make it clear that when a transaction involved a sending bank and a receiving bank situated in different States, the whole transaction was to be regarded as international.

26. Mr. AL-NASSER (Observer for Saudi Arabia) said that the existing wording of article 2(a) was far from clear and would not make provision for the circumstance in which reimbursement had been made to the receiving bank.

27. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the definition of a credit transfer would be more comprehensive if it envisaged not only the time at which the operation began but also that at which it was concluded. He drew attention in that connection to article 14, which referred to the "completion" of a credit transfer.

28. Mr. LOJENDIO OSBORNE (Spain) said that he would prefer the words "funds transfers" to replace the words "credit transfers" in the title of the draft Model Law, since, at least in Spanish, the present title was very broad in meaning and would include debit transfers, which were not intended to fall within the scope of the Model Law.

29. Mr. ABASCAL ZAMORA (Mexico) said that he believed the problem related solely to the Spanish version of the title of the draft articles. The purport of the term "credit transfers" in the English version was not in doubt.

30. The CHAIRMAN noted that under subparagraph (a) of article 2 the Commission had to consider the question whether the Model Law should apply to transfers affected through a point-of-sale payment system. A difference of opinion existed on the subject. It had to be borne in mind that such systems had not been fully developed.

31. Ms. KOSKELO (Observer for Finland) said that her Government believed that it was inappropriate to exclude point-of-sale transactions from the sphere of application of the Model Law solely on the ground that they involved debit transfers. It was in fact difficult to distinguish between credit and debit transfers in point-of-sale systems. It would therefore be preferable to leave open the possibility for point-of-sale systems to be covered by the Model Law, and accordingly to delete the sentence in square brackets in article 2(a).

32. Mr. FUJISHITA (Japan) said that his delegation too supported the deletion of the sentence, for the reasons given by the previous speaker and also because a specific reference in the Model Law to point-of-sale systems would be premature at the current stage of their development. It would be best to

(Mr. Fujishita, Japan)

leave the matter of the application of the Model Law to a specific point-of-sale system to be interpreted by the legislator or the courts in the light of the provisions in subparagraphs (a) and (b) of article 2.

33. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in the absence of a clear definition of a point-of-sale system, his delegation favoured the deletion of the sentence in square brackets in article 2(a).

34. Mr. BHALA (United States of America) said that in his country point-of-sale systems were regarded as giving rise to debit transfers, whereas other countries considered them to generate credit transfers. That divergence of views was a good reason to keep point-of-sale systems out of the Model Law. The Model Law was intended for use by commercial parties for commercial purposes, whereas point-of-sale systems were generally used for consumer purposes and should therefore be outside the scope of the Model Law. The Model Law would be a persuasive document for commercial parties if it was flexibly drafted, but tightly drawn in terms of what it covered. It would be unfortunate to complicate it by extending its regime to systems which had unknown implications.

35. Mr. LIM (Singapore) agreed with the views expressed by the representative of the United States. Electronic funds transfer at point of sale was generally a consumer matter rather than an inter-bank one. He therefore approved the sentence excluding point-of-sale systems from the operation of the Model Law.

36. Mr. ERIKSSON (Observer for Sweden) felt that it was not useful to discuss point-of-sale payment systems as though they were all alike. There were differences between them and certain systems might come within the scope of the Model Law. There was no reason for a specific rule in the Model Law to the effect that it did not apply to point-of-sale systems. He supported the proposal by Finland that the sentence in square brackets should be deleted.

37. Mr. GREGORY (United Kingdom) said that, while his delegation appreciated the concerns expressed by the United States and Singapore, there were provisions in the Model Law which went a long way towards meeting them. If a point-of-sale payment system involved a debit transaction, that transaction would be specifically excluded under the definition of the term "payment order". If it was a consumer system, its transactions would be excluded by virtue of the footnote to article 1. He saw no reason why point-of-sale systems should be excluded from the operation of the Model Law. In the future such systems might be used for commercial transactions and it would not be right for them to be explicitly excluded. His delegation therefore favoured the deletion of the sentence in square brackets.

38. The CHAIRMAN noted that a majority of speakers appeared to favour the deletion of that sentence.

39. He invited the Commission to comment on the last sentence of article 2(b), dealing with the question of unconditionality of payment orders.

40. Mr. SCHNEIDER (Germany) recalled that the Working Group had discussed conditional payment orders at some length and had reached broad agreement on the importance of certainty for banks involved in the payment process. His delegation had originally taken the view that the number of conditional payment orders was small. However, it had recently become aware of a trend towards the imposition of conditions by some banks, actuated by the wish to offer the public new types of product. A typical condition might be a statement that payment would only be made when the beneficiary had provided his bank with certain types of document.

41. Such products were outside the purview of the Model Law, but there seemed no reason why it should prevent banks from taking advantage of evolving techniques. A situation in which, because conditional instructions were excluded from the operation of the Model Law, one body of rules of law, namely the Model Law, governed unconditional payment orders while another governed conditional payment orders was inherently undesirable. There was, of course, nothing to compel a bank to accept a conditional payment order, so it could decide itself whether to do so or not.

42. Mr. ABASCAL ZAMORA (Mexico) referred to his Government's written comments (A/CN.9/347, pp. 41-42), in which an alternative text was proposed for the last sentence of article 2(b). He wished both to explain the reasons for his Government's proposal and also to refer to the comments made by the representative of Germany.

43. In the Working Group the proposal by the representative of the United States of America to exclude conditional payment orders altogether had met with considerable opposition. Because of the abstract nature of electronically processed transactions it had been thought essential to establish clearly that payment orders covered by the Model Law had to be unconditional.

44. The representative of Germany had referred to the fact that some banks did accept and execute conditional payment orders. Misunderstandings might arise where a conditional payment order was executed and a later occurrence unconnected with the conditionality of the payment supervened. The parties to the transfer might then find themselves deprived of their rights under the Model Law. Accordingly it had been decided that when a receiving bank received a conditional payment order, the fact that a bank had executed it would not necessarily mean that parties entitled to the benefit of the Model Law were deprived of their rights. That in turn had led to an attempt to devise new language according to which the principle would be contingent on the fulfilment or otherwise of the condition, i.e. the parties to the transfer might be covered by or excluded from the Model Law according to whether the condition was met. If it was not, the rights and obligations of the parties under the Model Law would not apply. The Working Group's decision had been that if an order was conditional, it was not a payment order, but if a receiving bank carried it out in accordance with the Model Law, the rights and obligations of the parties to the transfer would come into play.

(Mr. Abascal Zamora, Mexico)

45. His Government's proposed amendment to the final sentence of article 2(b) was simply an attempt to reflect the decision taken by the Working Group. It did to some extent also reflect the concerns of the German delegation. He agreed that conditional payment orders would not be abstract in the sense of credit transfers and would therefore not normally be covered by the Model Law; if, however, parties agreed to them, banks wishing to accept conditional payment orders could do so without affecting the abstract nature of the transfer or the underlying policy. His Government's insertion of the term "originator's bank" in square brackets in its proposal was intended as a means of restricting the meaning of the sentence.

46. Mr. AL-NASSER (Observer for Saudi Arabia) said that, although he personally approved the definition of a payment order as an unconditional instruction, he saw a need to address the category of conditional payment orders; as the representative of Germany had indicated, some banks were increasingly accepting and executing them. At the same time, as the representative of Mexico had rightly said, a conditional payment order was not to be considered a payment order within the meaning of the Model Law.

47. Following discussions with some Saudi Arabian banks on the Model Law proposals, he favoured the idea of allowing a margin of manoeuvre to the parties to such a contract. He took the view that banks which accepted conditional payment orders should be able to continue to do so without forfeiting their rights under the Model Law.

48. Mr. BURMAN (United States of America) wished to associate his delegation with the proposal made by the Government of Mexico. To his delegation's way of thinking, if a bank chose to accept from a customer a document imposing certain conditions with respect to the execution of a payment order, the manner in which it did so was a matter for its own judgement. It was for the bank to decide whether the conditions were satisfied or whether it had the authority to execute the payment order. If at that point the bank executed the order, presumably without conditions, it was a matter between the customer and the bank whether it did so properly, and it would not be right to deny it the benefits and obligations of the Model Law out of hand.

49. Turning to the statement made by the representative of Germany, he said that his delegation understood the concern felt over the many documents which banks issued with conditions attached to the payment process, whether they were called letters of credit, standby letters of credit or credit documents. Whatever they might be called, they related to a greater or lesser extent to underlying transactions of some sort which were covered by the working group at present engaged in discussing the issue of bank guarantees.

50. To his mind, to confuse those in one law would lead to the inevitable dilution of the focus of the Model Law and, predictably, leave the Model Law without the possibility of impact in the commercial world. He hoped that course would not be adopted. It was true that different specialities of commercial law dealt with discrete areas of transactional events between parties. It would be most beneficial if the present draft could remain

(Mr. Burman, United States of America)

focused on payment orders and the credit transfer process and leave management conditions to other areas of commercial law being pursued by another working group. The draft Model Law was, in his view, not the place to deal with those subjects.

51. Mr. GREGORY (United Kingdom) referred to the comments of the representative of Mexico regarding his Government's proposal for the last sentence of article 2(b). He agreed that the Working Group had decided that the question whether or not a condition had been satisfied should be outside the Model Law. It was therefore true that the present wording of the sentence might not fully reflect the wishes of the Working Group. However, he was not sure that he knew exactly how the Mexican proposal would work; the point that caused him particular difficulty was the words "for the purposes of this law", because they suggested to him that the Mexican proposal amounted to the existing wording of the sentence without the qualification "but the condition is subsequently satisfied". If that was so, it would no longer be clear when an order of the kind in question came within the scope of the Model Law. Since the aim of the Model Law was to create certainty, he asked the Mexican representative to explain how conditional payment orders would become subject to the Model Law.

52. Mr. ABASCAL ZAMORA (Mexico) replied that he was in complete agreement with the representative of the United Kingdom. He believed that the points raised were linguistic ones and could be treated as a matter of drafting.

53. Mr. DE BOER (Netherlands) said that he had reacted to the Mexican proposal in the same way as the representative of the United Kingdom. He did not see how one could say that a condition would be deemed not to have been made because it was not fulfilled. The Model Law was written for unconditional payment orders; the rules of the Model Law should accordingly not apply where conditions were attached. He suggested that the point might be met, if it was decided to include conditional payment orders in some way, by saying that the provisions of the Model Law applied to conditional payment orders to the extent that the conditional character of the order permitted.

54. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the definition of a payment order as an unconditional instruction was in line with general banking practice. He instanced cheques, which were always unconditional.

55. Ms. KOSKELO (Observer for Finland) said that her delegation considered the present text preferable to the Mexican proposal because the effect of the latter would be that a receiving bank would be allowed under the Model Law to treat a conditional payment order as if it were unconditional. She believed that had not been the intention of the Working Group and that the requirement in the present draft that the condition subsequently be satisfied was an important one. If that requirement were left out, a situation would be created in which receiving banks could treat conditional payment orders as if they were unconditional and disregard the fact that they had conditions attached to them.

56. Mr. ABASCAL ZAMORA (Mexico) replied that the effect of his Government's proposal would not be as understood by the delegation of Finland. A bank receiving a conditional payment order would be well aware that it was not receiving an unconditional payment order within the meaning of the Model Law. The decision of a bank to execute a conditional payment order because it had a contract with a customer was one thing; the fulfilment or not of a condition was another and was outside the purview of the Model Law.

57. Referring to the comments on the definition of a payment order in paragraphs 73-75 of the Working Group's report on its twenty-first session (A/CN.9/341), he said that his delegation's conclusion was that if a bank decided to execute a conditional payment order it would carry it out as if it were an abstract credit transfer. His delegation was emphatically not advocating giving the bank the right to decide whether or not a payment order was conditional.

58. The CHAIRMAN agreed that the Model Law should not deal with the question of whether conditions were or were not legally satisfied. It seemed to him that much uncertainty surrounded the present wording of the last sentence of article 2(b) and that the proposal of the Government of Mexico went some considerable way towards dispelling it.

The meeting rose at 5.05 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 441st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 11 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 2 (continued)

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The meeting was called to order at 9.50 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that, at the preceding meeting, there had been a trend towards accommodating the idea of a conditional payment order with certain modifications - although the Working Group, after a prolonged debate, had favoured a requirement of unconditionality. In the light of the Mexican proposal, it had become apparent that the existing text, in particular the wording "subsequently satisfied and thereafter" in the last paragraph of article 2(b), might give rise to problems, if it later became apparent that the condition to which a payment was subject had not been satisfied.

2. One of the objects of the Mexican proposal had been to take care of that problem. However, the observer for Finland had drawn attention to another possible difficulty, namely, the situation in the event of a payment order being executed without regard for the conditions specified. He was not certain that the Mexican proposal solved that problem.

3. Mr. ABASCAL ZAMORA (Mexico), referring to the question of the Model Law applying only if the relevant conditions had been subsequently satisfied, said that the problem of uncertainty was serious, because the parties to the transfer would not know whether the conditions had been satisfied or not and whether, therefore, they had obligations and protection under the Law or not.

4. Regarding the problem raised by the observer for Finland, he did not agree that a solution could not be found. If, for example, a person instructed a bank to execute a payment order provided that a certain condition was fulfilled, he thereby set up a contract with his bank that was governed by another law, not the Model Law. The bank, if it accepted that contract, had an obligation to carry out the instruction, otherwise it would be responsible under the terms of that other law. If a bank receiving a conditional payment order did not fulfil the conditions, it was not respecting its contract with its client. The Model Law was not concerned with the responsibility of a bank which violated a conditional payment order: that came within the scope of another law.

5. The CHAIRMAN said that it was surely intended that the Model Law should take care of such a situation, rather than leaving it to another law.

6. Mr. ABASCAL ZAMORA (Mexico) said that the problem was outside the law on credit transfers, which did not deal with conditions, because there was always uncertainty as to whether conditions had been satisfied or not. The question whether a bank had failed to meet conditions must therefore come under another law.

7. Mr. GREGORY (United Kingdom) said that the Commission was rediscussing a number of prior decisions and trying to find ways of reconciling different elements.

8. The first such decision, which was clearly expressed in the opening words of the definition of "payment order", was that, in order to be subject to the Model Law, payment orders should be unconditional. The Commission still adhered to that principle, but its members had agreed that, once a payment order which had started as a conditional order entered the system governed by the Model Law, it should be governed by the rules of the Model Law and the parties - particularly the originator - should have the rights and obligations for which the Law provided. The difficulty was to decide the precise moment at which what had once been a conditional payment order was to be treated as unconditional and what adjustments should be made to the rights and obligations.

9. As it stood, article 2(b) provided that the relevant moment came when the condition had been satisfied and the bank had executed the instruction. But, as pointed out by the Chairman, the fact that mention was made of satisfying the condition, which brought the transaction under the Model Law, inevitably raised the question whether the condition had been satisfied or not. The Mexican proposal would remove that element from the Law, but the Commission had still to ensure that a conditional payment did not fall within the scope of the Law until the bank had executed it and that a bank that executed a conditional payment order would not be subject to the rules in the Law concerning the timing of execution.

10. He suggested that the problem might be solved by the deletion of the words "but the condition is subsequently satisfied" and "thereafter" from the last paragraph of article 2(b) and the insertion of the word "thereafter" between the words "shall" and "be" in the penultimate line of that paragraph. The principle should be that the bank executing the conditional order did so outside the Law but that, once a payment order had been executed, it should come under the Law and be treated as unconditional.

11. Mr. ABASCAL ZAMORA (Mexico) said he supported the United Kingdom proposal.

12. Ms. KOSKELO (Observer for Finland) said that, while the United Kingdom proposal was an improvement, her delegation's problem was still unresolved. The Mexican proposal, as it was worded, gave the impression that, by executing a conditional payment order, a receiving bank would somehow be able to make the condition disappear for legal purposes, though that was hardly its intention.

13. The rights of the sender against a receiving bank which had executed a conditional payment - or had failed to do so - would be governed by a separate set of rules, and that must be made quite clear in the Model Law itself. To say that the Model Law would govern the payment order once a conditional payment order had been executed might well cause a misunderstanding, because the draft Model Law contained a provision to the effect that the rights and remedies under the Model Law were to be exclusive. It must be made clear that the Model Law did not interfere with the sender's rights against the receiving

(Ms. Koskelo, Observer for Finland)

bank, based on the fact that a payment order had been executed contrary to the conditions. Her delegation had no difficulty with the proposed text, as amended by the representative of the United Kingdom, provided that it was quite clear that the rights in question were not interfered with.

14. THE CHAIRMAN asked the observer for Finland whether she would be satisfied with the notion of an abstraction principle, i.e. if it were clearly understood that the obligation under the Model Law was completely independent of or abstracted from the underlying transaction.

15. Ms. KOSKELO (Observer for Finland) concurred.

16. Mr. SCHNEIDER (Germany) said that it might not be desirable to use the word "abstraction" in the sense of independence from underlying obligations, since there could be conditions which had nothing to do with such obligations. It might be better to refer specifically to the conditions laid down in a payment order by the originator or the originator's bank.

17. The Commission was discussing three separate problems. In the first place, it had been stated in the discussion that the Model Law applied only if a conditional payment order had actually been executed. If it were not executed, a different body of law would apply. That solution would be a regrettable one, since he believed that the Commission should try to include in the Model Law all the legal problems relating to conditional payments and that its sphere of application should be broadened accordingly.

18. The second problem was how to handle the offer of a conditional payment order under the Model Law. If the originator offered a conditional payment order to his bank, the choice was either to make the condition void or to apply article 6. In his own opinion, article 6 would not be applicable and the bank should be free to accept or reject a conditional payment order. Obstacles placed in the way of conditional payment orders would restrict the ability of banks to offer new types of service and such orders should be deemed payment orders under article 2.

19. The third problem was that of defining the duties of a bank that had accepted a conditional payment order. It must be made clear that, once a bank accepted a conditional payment order, its duty was to execute the payment and fulfil the condition. It would be better, therefore, to make no mention of conditional payment orders in article 2. They might, however, be mentioned in article 6, where it could be stated that a bank accepting such an order must do so expressly.

20. Mr. DE BOER (Netherlands) said he could accept the text proposed by the United Kingdom with the insertion of the word "unconditionally". It should be made clear that the receiving bank had executed the payment order unconditionally.

21. Mr. VASSEUR (Banking Federation of the European Community) said that the Commission did not seem favourably disposed to conditional payment orders,

(Mr. Vasseur, Banking Federation of the European Community)

upholding as it did the principle that payment orders were normally unconditional. However, since conditional payment orders existed and could not be ignored, a way must be found of first stating the principle and then qualifying it.

22. Two propositions had been put forward when the question was being discussed at the Working Group's twenty-first session in July 1990. The first was that conditional payment orders would fall outside the scope of the Model Law. That proposition had not won much support because, as had been said at the time, it was agreed as a general principle that, unless expressly decided otherwise, the parties had full freedom to derogate from the Model Law (article 3). The condition stipulated concerning a payment order was thus merely a derogation from the principle in the first sentence of article 2(b). The other proposition which had been adopted, stated that the occasional exception did not place the transaction as a whole outside the sphere of application of the Law and hence that the Law should be fully applied, especially the provisions concerning responsibility.

23. The Commission has not yet begun its consideration of article 3, which stated the principle of the contractual freedom of the parties to derogate from the provisions of the Law. He suggested, therefore, that it would be better to link conditional payment orders with that article. If that suggestion were accepted, then article 2(b) might be redrafted along the following lines: "'Payment order' means an instruction which is both unconditional, unless in application of article 3 below the sender's bank has agreed to execute a conditional order, provided that the condition has been actually satisfied, and is given by a sender to a receiving bank." The rest of the article would remain unchanged.

24. Mr. ABASCAL ZAMORA (Mexico) suggested, for the consideration of the Drafting Group, that wording such as the following might meet the concern expressed by the observer for Finland: "This law does not deal with the responsibility incumbent on the receiving bank which executes a conditional instruction as if it were a payment order."

25. Mr. BURMAN (United States of America) said he supported the initial Mexican proposal with the useful suggestions for clarification made by the representatives of the United Kingdom and the Netherlands and the observer for Finland. They would all help to achieve the separation of the parts of the commercial banking process concerned with the execution of payment orders and the conditional documentation and papers respectively. It was important that that separation should be carefully maintained, although he did not deny that some banks undertook and some customers requested conditional commercial transactions. He hoped, however, that representatives would do their best not to reopen basic structural issues and thus prolong the work of the Commission.

26. Mr. HUANG Yangxin (China) said that, if a receiving bank received a conditional payment order and believed that the condition might be satisfied after execution of the order, it should be free to execute the order on the understanding that it would be responsible for any consequences if the

(Mr. Huang Yangxin, China)

condition were not satisfied. He proposed that the words "when it was issued" at the end of the last sentence of article 2(b) be replaced by "when the conditions were satisfied" in order to avoid the possibility of liability due to the time-lag between the issuing of an instruction and the satisfaction of the condition attached to it.

27. The CHAIRMAN asked whether the Chinese proposal meant that the receiving bank thus placed in a situation of liability would be compensated but that such compensation would not fall within the scope of the Model Law.

28. Mr. HUANG Yangxin (China) said that, once the order had been executed, it would be deemed unconditional under the Model Law but continue to be regarded as conditional under the applicable law.

29. Mr. GREGORY (United Kingdom) said he thought there was general agreement that it should be made quite clear that, if a condition was stipulated by an originator, the Model Law in no way detracted from the responsibilities of the originator's bank in relation to the condition, but that no responsibilities in relation to the condition should be imposed on subsequent banks in the credit transfer chain. The thrust of the Finnish, Mexican and Netherlands proposals was thus to keep the part of the transaction involving the condition separate from the part in which the payment order was regarded as unconditional, without in any way denying that the condition existed. If separate rights with regard to conditional instructions were to be preserved, it was important that they should affect no parties other than the party sending the conditional payment order, the party receiving it and the latter's bank.

30. Ms. KOSKELO (Observer for Finland) said that, while the previous speaker's interpretation of her views was correct, she would like to add to the wording proposed by the delegation of the United Kingdom a sentence such as the following: "The Model Law shall not affect the rights of the sender of the conditional instruction vis-à-vis the bank that received and executed the conditional instruction."

31. Mr. ABASCAL ZAMORA (Mexico) said that his intention had been to state clearly that the Model Law did not cover the responsibilities of a bank in relation to a conditional instruction that it received and executed as though it were a payment order. Such responsibilities were covered by other laws.

32. The CHAIRMAN, recapitulating, said that the proposal by the delegation of Germany that two sets of rules be prepared, one for unconditional and the other for conditional payment orders - or, at least, endeavouring to accommodate the latter - was too ambitious and time-consuming. The proposal to amend article 6 to take account of the problem of conditionality was not feasible either, because of the changes which would then become necessary in subsequent articles.

33. There seemed, however, to be general agreement that the Model Law should concern itself with unconditional payment orders only but that, once executed,

(The Chairman)

a conditional order should be deemed to have become unconditional in relation to subsequent parties in the transaction and also, retroactively, in respect of the rights and obligations set forth in the Law. The conditional side would nevertheless remain subject to the applicable law and outside the scope of the Model Law. That point would be clarified by the additional sentence suggested by the observer for Finland.

34. The suggestion by the observer for the Banking Federation of the European Community that the problem of conditionality be dealt with under article 3 was not feasible in view of the agreement already reached by the Commission that conditional payment orders should be excluded from the purview of the Model Law. The suggested deletion of the phrase "but the condition is subsequently satisfied" from the last paragraph of article 2(b), while not ideal from the point of view of the German delegation, at least had the merit of distancing the Model Law from the vexed question of the satisfaction of conditions, without explicitly discouraging the inclusion of conditional payment orders within its scope.

35. Mr. DUCHEK (Observer for Austria) said that there appeared to be general agreement that, where a conditional payment order was deemed to have become unconditional on execution, the time-limits provided for in article 10 of the Model Law should not apply retroactively. From the drafting point of view, however, the retention of the phrase "when it was issued" did not seem to convey that principle sufficiently clearly.

36. Mr. GREGORY (United Kingdom) said he agreed that the problem was one of drafting rather than of principle.

37. Mr. LOJENDIO OSBORNE (Spain) said he was concerned about the process whereby a conditional payment was deemed to become unconditional. Conditionality was an integral part of a conditional payment order; it could not be abstracted away, but was necessarily passed on to all the banks involved in the credit transfer chain. The Model Law and the responsibilities stipulated by it should apply to a payment order executed by a bank regardless of conditionality and at all stages of the transaction.

38. The CHAIRMAN said that a conditional payment would be deemed to become unconditional merely for the purposes of the payment system and in order to bring it within the scope of the Model Law. No loss of conditionality through the operation of the Law was implied.

39. Ms. KOSKELO (Observer for Finland) said, with regard to the concern expressed by the observer for Austria about the phrase "when it was issued", that the Working Group had proceeded from the premise that a conditional instruction was not a payment order. It had thus been necessary to specify that, once executed, such an instruction would be dealt with as though it had been unconditional from the start so as to ensure that the sender of a conditional instruction had the same rights as the originator of a credit transfer. Her own suggestion that the word "thereafter" in the last clause of article 2(b), which would then read "the instruction shall thereafter be

(Ms. Koskelo, Observer for Finland)

treated as if it had been unconditional when it was issued", was intended to deal with the problem raised by the observer for Austria.

40. Mr. POTYKA (Observer for Austria) said that his delegation, which still wished to delete the phrase "when it was issued", did not think that the insertion of the word "thereafter" was sufficient to convey the idea that the time-limits set out in article 10 did not apply to conditional instructions.

41. Mr. BERGSTEN (Secretary of the Commission) said that, in the first place, the assumption that a condition stipulated by an originator was one to be satisfied by the originator's bank had been explicit in the earlier texts of the Model Law, but was not explicit in the current one. Secondly, the current text did not adequately reflect what seemed to be a policy decision by the Commission that cases in which there was never a "clean" instruction, i.e. cases in which conditions were passed all the way down the credit transfer chain and in which the conditions had no effect on the law itself, but only on the factual situation, fell outside the purview of the Model Law.

42. As the observer for Finland had reminded the Commission, the Working Group had, after a long discussion, concluded that, in terms of the Model Law, a credit transfer situation was created at the moment when the originator's bank sent a clean payment order. The purpose of the clause "the instruction shall be treated as if it had been unconditional when it was issued" was to ensure that the originator of the conditional instruction would also be the originator under the Model Law.

43. Mr. DE BOER (Netherlands) said he wished to repeat an earlier proposal by his delegation that wording be added to the text to the effect that the provisions of the Model Law would apply to conditional payment orders to the extent that the conditional character of the payment order permitted.

44. The CHAIRMAN said that, although earlier texts of the paragraph under consideration had referred to the originator's bank, it should be borne in mind that certain conditions might be imposed on intermediary banks designated by the originator. For the time being, therefore, it would be wise to avoid the phrase "originator's bank" in the wording adopted. At the same time, attention should be paid to the relevant comments by the Secretariat (A/CN.9/346, pp. 14-15, para. 19) in connection with the problem of time-limits mentioned by the observers for Austria and Finland.

45. The discussion seemed to have reached a stage at which it might be appropriate to designate a drafting group to formulate a text, having regard to the points raised by the representatives of the Netherlands and the United Kingdom and the observers for Austria and Finland.

46. Mr. GREGORY (United Kingdom) said that, when a matter was referred to a drafting group the policy of the Commission regarding it should be made quite clear. The representative of the Netherlands had just introduced a new question that could not be resolved by the drafting group. However, his

(Mr. Gregory, United Kingdom)

delegation would find the procedure acceptable if the Commission were to discuss that question after the drafting group had produced wording to express what the Commission had already agreed.

47. The point made by the Secretary had been addressed in an earlier suggestion by the delegation of the Netherlands, namely, that the word "unconditionally" be inserted after the words "executes it" in the last paragraph of article 2(b). It was important that a bank receiving a conditional payment order to implement a transfer should issue a "clean" order. That was, he thought, the purport of the discussion, though it was not clearly brought out in the text before the Commission.

48. The CHAIRMAN suggested that a drafting group consisting of the representatives of the United Kingdom and Mexico and the observer for Finland should be set up to consider article 2(a), particularly the suggestion that the words "series of operations" be replaced by "series of payment orders", and that the wording of the phrase "intended to carry out the originator's payment order" be improved, if possible.

49. It was so agreed.

50. Mr. BISCHOFF (Observer for Switzerland) said that article 2(b)(i) should not govern the definition of a payment, since it referred to a part only of the consequences of a payment order. The point should be dealt with under article 4(6).

51. Mr. DE BOER (Netherlands) said he supported that suggestion and thought that article 2(b)(i) was superfluous.

52. Mr. BHALA (United States of America) said that article 2(b)(i) should be retained, since it was essential that the provision should be restricted to credit transfers and should not include debit transfers. In the discussion held the previous day on point-of-sale systems, the representative of the United Kingdom had said that both the sub-subparagraphs ((i) and (ii)) of article 2(b) should be retained, a view which his own delegation wholeheartedly supported.

53. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the provision would be clearer if it stated that a payment order might be conveyed by any means of communication.

54. The CHAIRMAN said that, while the provision in article 2(b)(i) could be interpreted as covering that concern, the drafting group might be asked to consider whether some additional words could be added, such as "sent by the sender by any means", or whether that would raise new issues and might be unnecessary.

55. Mr. KOMAROV (Union of Soviet Socialist Republics) said he could accept that approach.

56. Mr. LE GUEN (France) said that the proposal by the representative of the USSR that it be stated in article 2(b) that the payment order might be conveyed "by any means" was too broad. It might result in banks being presented with payment orders in commercially unacceptable forms.

57. Mr. GREGORY (United Kingdom) said he agreed that the definition should refer to transfers by any means, but felt that that was already implicit in the text. If it was expressly stated, he did not think it implied that payment orders had to be accepted by a bank if made in an unacceptable form.

58. The CHAIRMAN said that the receiving bank could reject any payment order not made in proper form. He suggested that the point at issue should be referred to the drafting group.

59. It was so agreed.

60. Mr. GREGORY (United Kingdom) said that sub-subparagraph (ii) of article 2(b) specified that the instruction must not provide that payment was to be made at the request of the beneficiary. The intention had been to exclude debit transfers, but it might also have the effect of excluding credit transfers to a beneficiary who did not have an account and where the beneficiary's bank was instructed to "pay on application". To overcome that problem, he proposed the inclusion of the following new paragraph after article 2(b)(ii):

> "Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

61. Mr. SCHNEIDER (Germany) said that the Commission had already defined a condition as an uncertain event. The situation described by the representative of the United Kingdom was a condition.

62. Mr. GREGORY (United Kingdom) said that it was not a condition of the kind that had been discussed earlier. It was simply a method of payment.

63. Mr. SCHNEIDER (Germany) said that, in the situation envisaged by the representative of the United Kingdom, payment by the beneficiary's bank was conditional on application by the beneficiary. It was a matter of some significance.

64. Mr. ADEDIRAN (Nigeria) said he supported the United Kingdom proposal. The receiving bank was not obliged to accept a payment order that it could not carry out. In general, as many conditions as possible should be accommodated within the Model Law.

65. Mr. GREGORY (United Kingdom) said that, if his proposed new paragraph began "Nothing in this paragraph shall prevent ...", the conditionality difficulty might be resolved.

66. The CHAIRMAN suggested that the United Kingdom proposal might be accepted in substance and its form referred to the drafting group.

67. It was so decided.

68. The CHAIRMAN invited the Commission to consider article 2(c).

69. Mr. POTYKA (Observer for Austria) said the word "issuer" should be replaced by "sender" in article 2(c), since the word sender was defined in article 2(e).

70. The CHAIRMAN recalled that the representative of Canada had suggested that "send" should be used in place of "issue" throughout the text of the Model Law.

71. Mr. BHALA (United States of America) said he supported the views of the observer for Austria and the representative of Canada.

72. Mr. GREGORY (United Kingdom) said that, while he had no objection to the replacement of "issuer" by "sender" in article 2(c), he did have reservations about the general substitution of "send" for "issue" throughout the text of the Law. There might be cases, such as telephoned instructions, or written instructions given over a counter, when the instruction was issued but not sent.

73. Mr. GRIFFITH (Observer for Australia) said he agreed that "sender" should replace "issuer" in article 2(c). However, he shared the view of the representative of the United Kingdom that the substitution should not be carried out passim.

74. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he agreed with the views of the observer for Austria.

75. Ms. KOSKELO (Observer for Finland) said that the Working Group had deliberately chosen the word "issue" to express the idea of giving a payment order.

76. Mr. LIM (Singapore) agreed with the observer for Finland. To eliminate the term "issue" would cause confusion.

77. Mr. ERIKSSON (Observer for Sweden) said he was strongly opposed to the use of the word "sender" in article 2(c) as it might cause new problems. The text as drafted was quite acceptable.

78. Mr. AL-NASSER (Observer for Saudi Arabia) said that, since the term "issuer" was preferable in Arabic, he favoured retention of the text as it stood.

79. The CHAIRMAN said that "issue" implied the giving of an instruction. "Send" had no such connotation, and might, moreover, exclude instructions that were conveyed by hand. As he heard no counter-argument from the proposers of the change, he took it that the Commission wished to retain the word "issuer".

80. It was so decided.

81. The CHAIRMAN invited the Commission to consider article 2(e).

82. Mr. GRIFFITH (Observer for Australia) suggested that article 2(e) should refer to "a" person who issues ..., not "the" person, since the issuer of the payment order might be more than one person.

83. Mr. GREGORY (United Kingdom) said he thought that the issuer would always be only one person, even in the case of a series of separate orders by the originator and any sending bank. "A" person would still be a single person, but he had no objection to the change.

84. The CHAIRMAN said he took it that the Commission wished to adopt the suggestion by the observer for Australia and amend article 2(e) accordingly.

85. It was so decided.

86. The CHAIRMAN invited the Commission to consider article 2(d).

87. Mr. BURMAN (United States of America) suggested that the discussion of article 2(d) should be postponed until after article 2(f) had been discussed, because the definition of the beneficiary was dependent on the definition of a bank.

88. It was so agreed.

The meeting rose at 12.25 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 442nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 11 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 2 (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN invited the Commission to consider article 2(f), which defined the term "bank".

2. Mr. ADEDIRAN (Nigeria) said that, in view of the fact that in some jurisdictions individuals were permitted to act as banks, subparagraph (f) should refer to "any person who accepts payment instructions".

3. Mr. IWAHARA (Japan) said that the definition proposed by the United States in its written comments (A/CN.9/347/Add.1, p. 12) would be unduly restrictive; it would, for example, exclude certain bank branches in Japan which executed payment orders without demanding deposits. It would also lead to confusion as to which entities were covered by the Model Law: would it, for example, cover post offices engaged in credit transfers?

4. Ms. KOSKELO (Observer for Finland) said that post offices should be included in the sphere of application of the Model Law if they provided a credit transfer service. She wondered if that would be the result if banks were defined as depositary institutions. In its written comments on subparagraph (f) of article 2 (A/CN.9/347, p. 16) her Government had pointed out that the second sentence of the subparagraph seemed superfluous in view of the definition of the term "execution" in subparagraph (1).

5. Mr. SCHNEIDER (Germany) agreed with the observation made by the representative of Japan.

6. Mr. LIM (Singapore) said that he supported the Canadian and United States written proposals, which made provision for licensing by a country's central banking authorities. As to the comment by the representative of Japan concerning post offices, a possible formulation would be to state that a bank was an institution licensed by the central banking authorities, including an institution authorized by those authorities to carry out international credit transfers.

7. Mr. BHALA (United States of America) said that his Government's proposed definition aimed at narrowing the scope of the term "bank" so as to exclude securities firms such as, for example, Western Union. The textual suggestion made by the representative of Singapore was well-founded and might usefully be adopted.

8. Mr. HUANG Yangxin (China) said that most countries had regulatory bodies for the banking sector and that the existing definition took adequate account of that.

9. Mr. AL-NASSER (Observer for Saudi Arabia) said that the existing definition could be made more comprehensive by specifying in the first sentence that a bank was an entity licensed to accept and give effect to payment orders.

10. Mr. POTYKA (Observer for Austria) said that his delegation approved the second sentence of subparagraph (f).

11. Mr. SCHNEIDER (Germany) said that he understood that the modernization of the banking system at present under way in the United States would involve entities which were holding concerns with multiple subsidiaries. He wondered how the Model Law would affect those subsidiaries if payment orders were transmitted to them.

12. Mr. BURMAN (United States of America) said that federal legislation to regulate securities firms was pending and would cover the field of credit transfers, but that the question of such firms and their regulation had not been tackled in the Working Group. As far as the definition in article 2(f) was concerned, his delegation felt that the more narrowly a bank was defined, the more likely it was that the Model Law would gain general acceptance.

13. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that in his view a broader approach would be preferable. He therefore suggested that the definition should state that a bank meant any entity which engaged in making payment orders.

14. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation had concluded that all entities engaged in credit transfer operations, including post offices, brokers, securities firms and stock exchanges should fall within the purview of the Model Law in order to ensure that they could compete on a footing of equality. It could therefore accept the existing definition but could also go along with an additional sentence stating that an entity was not a bank if it was confined to transmitting payment orders.

15. Mr. DE BOER (Netherlands) said that a reference to regulatory bodies would be out of place in the Model Law, whose provisions fell solely within the scope of private law.

16. Mr. BHALA (United States of America), responding to the comment made by the representative of Japan, said that foreign banks in the United States would be covered by sub-subparagraph (ii) of the definition proposed by the United States, and also by sub-subparagraphs (iii) and (iv), because they received deposits and had the power to accept demand deposits in their home countries.

17. In regard to the point raised by the representative of the Netherlands, he said that the question of supervision of the entities covered by the Model Law could not be disregarded. The distinction between public law and private law would have to give way as the discussion of the articles of the Model Law proceeded.

18. Mr. BURMAN (United States of America) expressed concern that a move was being made to bring a large number of entities within the scope of the Model Law regardless of their supervisory and regulatory arrangements and their functioning.

19. Mr. BHALA (United States of America) said that, if the Commission so wished, his delegation would be willing to modify sub-subparagraphs (ii), (iii) and (iv) of its proposed definition to cover post office services.

20. Mr. RENGER (Germany) opposed the proposal by Saudi Arabia. To include a licensing requirement in the Model Law would introduce public law into a matter of private international contract law. He was therefore unable to accept the arguments put forward by the United States delegation either.

21. Mr. GREGORY (United Kingdom) did not think it would be helpful for the Model Law to refer to a licensed institution, for the reason given by the representative of Germany. Although the Model Law did not require credit transfer institutions to be supervised, it was nevertheless being drafted to deal with transactions to which supervisory rules were crucial. The United Kingdom favoured the first sentence of the existing definition of the term "bank". The impact of the supervisory regime on other institutions, particularly in the securities business, needed to be considered further. It had not been demonstrated that the Model Law should not be applicable to all those who undertook credit transfer operations as an ordinary part of their business.

22. Mr. LE GUEN (France) said that limiting the meaning of the term "bank" to institutions that were licensed and subject to regulatory authority was unacceptable to France, a country in which the post office carried out certain financial transactions without being licensed and the central bank operated on behalf of the Government on an unlicensed basis. Furthermore, limiting the meaning of the term to institutions that received deposits would conflict with French banking law, under which a bank was either an institution that received deposits or one that made credit available. In Europe the term "credit institution" meant an institution that was not limited to receiving deposits.

23. Mr. AL-NASSER (Observer for Saudi Arabia) said that he had proposed the use of the term "licensed" because some States exercised control over credit transfers by providing that an institution that was not licensed to execute payment orders could not do so. He understood that entities such as the Society for Worldwide Interbank Financial Telecommunications (SWIFT) that effected banking operations were authorized to do so by a bank.

24. Mr. LOJENDIO OSBORNE (Spain) approved the first sentence of article 2(f) as it stood. It was not reasonable for a credit transfer to fall outside the scope of the Model Law because of national licensing practices. If a non-authorized entity engaged in transactions for which a licence was required, it would be liable to administrative sanctions in the country concerned. The Model Law would cover the consequences of events such as bankruptcy; for example, if a bank selected as an intermediary an entity that did not offer sufficient guarantees of solvency, article 16(8) would apply.

25. Mr. LOPEZ ROCA (Observer for Colombia) said that the term "bank" normally referred to an institution involved in an activity restricted to entities holding a government licence, whereas the definition in article 2(f) sought to extend the term to entities executing payment orders which were not required to be licensed. A middle path would be to use in article 2(f) a term applicable to any person executing payment orders, whether licensed or not. If the Commission decided to employ the term "bank" notwithstanding what he had said, it would have to be understood in a broad sense, but the Commission might usefully consider replacing it by a different expression.

26. Mr. ADEDIRAN (Nigeria) said the meaning of the term "bank" should not be looked at in terms of traditional banks but rather in terms of the transactions undertaken. Any entity that accepted an international payment transfer should be considered a bank.

27. Mr. BURMAN (United States of America) said that his delegation was inclined to support the Colombian suggestion. If the Commission decided that the definition should include entities other than traditional banks, it would be advisable to avoid the use of the word "bank". That term had a specific meaning in many people's minds and it would be better to clarify the situation by using a term such as "credit transfer institution", which the Secretariat had suggested (A/CN.9/346, p. 18, para. 40). Its merit was that, whether broadly or narrowly defined, it had a recognized meaning.

28. Mr. BERGSTEN (Secretary of the Commission) said that there was no disagreement with the United States view that the term "bank" as presently defined raised problems. The fact remained that no suitable alternative had yet been found. The Secretariat had looked at various possible replacements and had found that each of them, like the term "bank", had a specific meaning which was not exactly what the definition was intended to convey. The objection to the term "credit transfer institution", which did describe accurately what was intended, was its awkwardness. A happy solution would be a term which produced a neat acronym such as SWIFT.

29. Mr. LE GUEN (France) suggested the term "credit transfer entity". The word "entity" could then replace the word "bank" in the terms "receiving bank", "intermediary bank", and so on.

30. The CHAIRMAN said it was his feeling that the majority approved the first sentence of article 2(f) as it stood, subject to a decision as to whether the word "bank" or another term was to be used, and that it believed that a reference to licensing would be inappropriate.

31. He invited the Commission to move on to the second sentence of subparagraph (f) of article 2. It had been suggested that the sentence might be deleted, for two reasons. The first was that it stated the obvious and added nothing to the meaning. The second was that the word "merely" carried unintended negative implications: where business other than transmission was transacted, it was thought that doubt might arise as to whether or not it was covered by the Model Law.

32. Mr. LOJENDIO OSBORNE (Spain) favoured the deletion of the sentence. The place in which to deal with what was meant by an executing entity was in the definition of the term "execution", which needed to be expanded to cover execution by the beneficiary's bank.

33. Mr. BHALA (United States of America) said that his delegation believed the second sentence to be important and certainly not unnecessary. He took the view that it added substance and clarity to the term "bank" or "entity" or whatever expression the Commission decided should be defined in article 2(f). It ensured the exclusion of mere money transmitters and precluded at least in some cases a debate as to whether or not a data manager such as SWIFT was engaged in the execution of payment orders.

34. Mr. BURMAN (United States of America) said that the negative implications ascribed to the second sentence were not apparent to his delegation, which had been advised that opinions varied as to whether transmitters of messages, such as SWIFT, were to be considered transmitters of funds. The point was not clear, and clarity as to what the Model Law covered was essential. If the sentence had negative implications they should be discussed, and a way found of dealing with them which did not result in the application of the Model Law to institutions which it was not wished to cover. If the Commission completed its work and immediately afterwards people began to ask whether SWIFT or other data managers, or INTELSAT, or a given telecommunications network was covered, the law should be clear on the point.

35. Mr. BERGSTEN (Secretary of the Commission) observed that a comparison of SWIFT with the Clearing House Interbank Payments System (CHIPS) was instructive. If SWIFT was considered a value-added network, it could be regarded as doing more than just transmit; in connection with a given payment it did not do much more than transmit a message, but it did nevertheless add a transaction number and a sequential number. That, however, did not affect the payment transaction itself. CHIPS, on the other hand, clearly did much more than transmit in that it added and netted, thus affecting the payment process itself in a way that SWIFT did not. The biggest problem was caused by the use of the word "merely", but the solution was not simply to delete that word, because a bank itself might transmit. Some banks had their own satellites, transponders and telecommunications networks as part of their banking operation, so that great care must be taken not to end up with a sentence which suggested that someone who transmitted money messages was not a bank, as that would exclude some transmitters that clearly were banks.

36. Mr. BURMAN (United States of America) thanked the Secretary for his very useful explanation. At some stage he hoped to offer some drafting suggestions to meet the problem. As to whether SWIFT was or was not engaged in the transfer of funds, both positions had their proponents; he would agree that CHIPS had a more compelling case to be included in that category, but even as to SWIFT the point needed to be dealt with.

37. Mr. AL-NASSER (Observer for Saudi Arabia) remarked that it would be premature to delete the second sentence of subparagraph (f) while the first sentence remained undecided. He would prefer that part of the definition to be settled before a decision was taken on the second sentence.

38. The CHAIRMAN suggested that the discussion might proceed on the assumption that the term being defined was "bank" unless and until a better term had been found.

39. Mr. LIM (Singapore) said that, as the representative of Spain had pointed out, the notion of execution was defined in article 2(1). Perhaps the point made in the second sentence of subparagraph (f) could be taken care of instead by adding at the end of subparagraph (1) the words "but excludes the mere transmission of a payment order".

40. Mr. LOJENDIO OSBORNE (Spain) thought it was clear from the definition of the term "execution" that it did not cover the mere transmission of a payment order.

41. The CHAIRMAN said that, if there was no opposition to the idea underlying the suggestion made by the representative of Singapore, the Secretariat might be asked to work out some formula to ensure that institutions merely transmitting payment orders were excluded from the operation of the Model Law, for consideration at a later meeting.

42. He suggested that the Commission might now deal with subparagraph (d).

43. Mr. BHALA (United States of America) said that, in view of the discussion just held on the definition of the term "bank", his delegation did not need to make its intended point regarding subparagraph (d).

44. The CHAIRMAN said that, if there was no objection, he would take it that the Commission was ready to leave subparagraph (d) as it stood.

45. He invited the Commission to consider the question whether there should be a general provision to the effect that branches of banks should be regarded as separate banks for the purposes of the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that, as pointed out in the Secretariat's comments (A/CN.9/346, p. 18, para. 41), it had been suggested at an earlier stage in the drafting of the Model Law that the definition of the term "bank" should provide that "for the purposes of these Rules a branch of a bank is considered to be a separate institution". However, the Working Group had decided that it should first consider in relation to each substantive article whether branches should be treated as banks. Now might be an appropriate time to consider whether branches and separate offices of a bank were always to be regarded as separate banks for the purposes of the Model Law, and if so to consider covering the point by means of a general provision in the definitions. As mentioned in paragraph 43 of document A/CN.9/346, there might be provisions of the draft other than those containing references to branches in relation to which the status of branches should be considered.

47. Ms. KOSKELO (Observer for Finland) said it seemed to her that there were at least some provisions in the Model Law in which it would not be appropriate to regard branches as separate institutions - for example, the provisions regarding refunds in article 13 and those on liability and damages in

(Ms. Koskelo, Observer for Finland)

article 16. Otherwise, the result would be that liability would relate only to the assets of the branch. Clearly, it must be possible to use the assets of the whole bank to fulfil an obligation in such a case. If a general rule was introduced, it would be necessary to ensure that provisions such as those were excluded from its operation.

48. The CHAIRMAN suggested that the general provision might state that, "for the purpose of credit transfer", branches and separate offices were considered separate banks.

49. Mr. ADEDIRAN (Nigeria) said that it would be important to make clear what their situation was in relation to liability.

50. Mr. AL-NASSER (Observer for Saudi Arabia) said that the head office of a bank must act as the guarantor when questions of liability arose in relation to a branch.

51. The CHAIRMAN asked whether the Secretary could indicate which provisions of the Model Law would need to be excluded from the suggested general rule.

52. Mr. BERGSTEN (Secretary of the Commission) said he thought that the view of the Working Group had been that a provision that branches were to be treated as separate banks was needed in relation to the sphere of application of the Model Law and also in relation to operational matters. Articles 13 and 16 were different. The problem before the Commission was one of drafting as well as one of substance.

53. The CHAIRMAN suggested that the problem should be borne in mind during the discussion of the individual articles; once the substantive question was decided in each case, it would be a drafting matter to decide whether separate provisions or a general provision covering all articles would be appropriate.

54. Mr. ABASCAL ZAMORA (Mexico) thought that there might be reasons of principle against making it a general rule that branches of banks were considered to be different banks. The notion of a bank as a single legal entity should be preserved; the general rule should perhaps reflect that principle, with exceptions made where necessary.

55. The CHAIRMAN said he thought there was little difference in substance between the views expressed. The point would be considered as it arose in relation to individual articles.

The meeting rose at 5.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)* OF THE 443rd MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 12 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

Article 2 (continued)

* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 10.00 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. Mr. BERGSTEN (Secretary of the Commission), recalling the discussion that had taken place in the previous meeting, invited the members of the Commission to propose alternatives to the word "bank" for adoption by the Commission.

2. The CHAIRMAN said that an alternative word for "bank" was undoubtedly needed but that a decision was not required immediately, so there was time for reflection.

3. In the absence of any comments on article 2(g) and (h), he took it that the Commission wished to adopt those definitions.

4. It was so decided.

5. The CHAIRMAN invited the Commission to consider article 2(i).

6. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a drafting error in the French version of article 2(i). To reflect the concept of "includes", it would be necessary to insert a word such as "notamment" in the first line, between "on entend" and "le crédit porté".

7. The CHAIRMAN said the matter could be left to the drafting group. In the absence of any other comments, he took it that the Commission wished to adopt article 2(i).

8. It was so decided.

9. The CHAIRMAN invited the Commission to consider article 2(j). He drew attention to the comments by the Government of the United States of America (A/CN.9/347/Add.1, p. 12) where it was proposed to amend the definition of "authentication" by deleting the words "all or part of" and inserting, after the words "payment order", the words "an amendment of a payment order".

10. The Government of Canada wished to enlarge the definition of "authentication" by referring to procedures to detect error (A/CN.9/347, p. 5, section VI). However, the Working Group had regarded "authentication" as relating only to identification of the source and had decided to treat detection of error as a distinct question. The Working Group had drafted the current text accordingly.

11. Mr. HUANG Yangxin (China) said he agreed with the United States proposal, which did not exclude a procedure whereby one part of the payment order was authenticated in order to provide authentication of the whole.

(Mr. Huang Yangxin, China)

12. He would also like to know whether, with due regard for article 4A of the Uniform Commercial Code of the United States, a comparison of signatures constituted an authentication procedure. Since the Model Law did not exclude transfers effected by means of documents, he thought that authentication would have to include a comparison of signatures.

13. Mr. BHALA (United States of America) said that the reason for his Government's proposal was to be found in the realities of banking practice. Payment orders were authenticated only in their entirety, not in part. In the event of amendment, the amendment was likewise authenticated in its entirety. The Model Law should reflect operational reality as closely as possible in order to gain acceptance in the commercial world.

14. Mr. LIM (Singapore) said that, while he thought that the reference to part of a payment order would encompass an amendment to a payment order, he had no objection to the United States proposal.

15. Ms. KOSKELO (Observer for Finland) said that her only difficulty with the United States proposal was that the Model Law made no reference elsewhere to amendments of payment orders. To introduce the concept at that stage might give rise to problems and confusion. In her own view, an amendment to a payment order, for example to change the amount, constituted a new payment order. The receiving bank would need to consider separately whether to accept it or not. She therefore felt that the definition of "authentication" should refer only to payment orders and revocation of payment orders.

16. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the reasoning of the observer for Finland. During the preparation of the initial drafts of the Model Law, the inclusion of "amendments" to payment orders had been considered but rejected, because of the difficulties arising therefrom. Consequently, the existing text referred only to payment orders and the revocation of payment orders.

17. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to the Secretariat's comments on the subject (A/CN.9/346, p. 64, para. 3), which gave the history of consideration by the Working Group of the possible inclusion in the Model Law of a reference to "amendments" to payment orders.

18. Mr. CONOBOY (United Kingdom) said he had no difficulty with the deletion of "all or part of". The representative of China had rightly pointed out that authentication could be applied to certain elements of a payment order in order to determine the authenticity of the whole payment.

19. On the question of "amendment", he shared the concerns of the observer for Finland. He understood that the Working Group, whether implicitly or explicitly, had decided not to include "amendments".

20. Mr. DE BOER (Netherlands) pointed out that article 2 began with the words "For the purposes of this law:". Article 2 should therefore define only terms that were used elsewhere in the Model Law, and "amendments" were not so used.

21. The CHAIRMAN said that, from the views expressed, it appeared that the Commission wished to follow the recommendation of the Working Group and make no reference to "amendments" of payment orders. He also took it that the Commission was prepared to accept the proposed deletion of the words "all or part of" from article 2(j).

22. It was so decided.

23. The CHAIRMAN invited the Commission to consider the suggestion by the Government of Finland (A/CN.9/347, p. 16) that the sentence "The term does not include comparison of a signature with a specimen." should be added at the end of article 2(j).

24. Ms. KOSKELO (Observer for Finland) said that the question was whether the provisions of paragraphs 2, 3 and 4 of article 4 should apply to a signature comparison. In her view, that was not the intention, the case where an unauthorized person forged a signature being covered by article 4(1). Consequently, it should either be made clear in the definition that a comparison of signatures did not constitute authentication for the purposes of the Model Law or else the point could be dealt with in article 4.

25. Mr. ABASCAL ZAMORA (Mexico) said that documented payment orders were widely used in national and international trade, where electronic means were not available, and the normal method of authentication was still the signature or other simple means of identification. Comparison of signatures was also a commercially reasonable method of security as specified in article 4(2). The Finnish proposal to exclude the possibility of signature comparison would be restrictive and would run counter to the autonomy of the parties concerned. It was therefore unacceptable.

26. Ms. KOSKELO (Observer for Finland) said that there appeared to be a misunderstanding. Her delegation had no wish to exclude authentication by signature. The problem was that if paragraphs 2 to 4 of article 4 were extended to cover authentication of signatures, the liability of the person whose signature had been forged would also be extended, beyond the provisions of the general rules of law - at least in her own country's legal system - and that was undesirable. She therefore considered that the use of a signature to authorize a payment order should be covered by article 4(1) and that the provisions of article 4, paragraphs 2 to 4 should not be extended.

27. Mr. SCHNEIDER (Germany) said that, as a general rule, the sender was not bound if his signature was forged by a third person. If, however, the parties had agreed to the authentication procedure and if the forgery resembled the genuine signature, the sender would be bound. That might not be a commercially reasonable procedure under article 4(2), but, if a large sum of money was involved, the parties might well agree that a mere verification of the signature would not be enough. It would be better to leave the problem to agreement between the parties and keep article 4 unchanged.

28. Mr. HUANG Yangxin (China) said that, in his opinion, the forged signature problem could not be solved by article 4(1) alone. The parties concerned would have to ascertain whether a signature was genuine or not. It would be

(Mr. Huang Yangxin, China)

dangerous if the authentication procedure were as simple as the observer for Finland seemed to believe. In his view, the problem must be solved by the parties. If a large sum were involved, they could agree on additional methods of authentication, for example by telegram.

29. Mr. ERIKSSON (Observer for Sweden) said he agreed with the observer for Finland that the problem was not simply one of definition under the Model Law, but concerned the law on the liability of parties. It might be better to deal with it under article 4.

30. Comparison of signatures was the normal method of authenticating documented orders and should obviously not be excluded by the rules of the Model Law. Paragraphs 2 to 4 of article 4 placed the liability in the case of a forged signature on the person whose signature had been forged and the Finnish proposal, which had the merit of limiting that possibility, deserved further discussion.

31. Mr. VASSEUR (Banking Federation of the European Community) said that a mere reference to a signature would not solve all the difficulties, because many payment orders were given without a written signature on paper - for example by telex or electronically. One of the problems of concern to his Federation was how electronic signatures were to be treated and whether a code was necessary. In his own opinion, the issue was covered by article 2(j), although it might be necessary to specify what types of signature were meant, such as handwritten or electronic.

32. Mr. LIM (Singapore) said he agreed with the preceding speaker. He suggested, moreover, that provision should also be made for facsimile signatures.

33. Mr. DE BOER (Netherlands) said that, like the observer for Finland, he thought that signature comparison would not normally come under the authentication procedure referred to in paragraphs 2 to 4 of article 4. Provision must be made, however, for the parties to agree and the solution might be to adopt the Finnish proposal with the addition of wording on the following lines: "unless the parties expressly agree otherwise."

34. Ms. KOSKELO (Observer for Finland) said that she would be satisfied to defer the discussion until article 4 came up for consideration. The core of the problem was whether the rules on distribution of risk under paragraphs 2 to 4 of article 4 were reasonable in the case where a signature was used. In her opinion they were not, because the provisions on authentication were based on the use of a secret code or password, whereas a signature was visible to all and could never be kept secret. The signer was always vulnerable, because a signature could always be forged.

35. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that he understood the concern of the observer for Finland about the possibility of forgery and whether the bank or the client was liable. In practice, however, banks and clients normally worked on the basis of signatures and working

(Mr. Tchernychev, Union of Soviet Socialist Republics)

methods were subject to agreement between them. A client concerned about the possibility of forgery could always ask the bank to use other methods of verification in addition to the authentication of a signature. There was nothing in article 4 to prevent agreement between the parties and, in any case, the possibility of forgery was exceptional.

36. Mr. HERZBERG (Observer for Israel) said that a payment order or a cheque with a forged signature was not, in fact, an order to pay even if, in extreme cases, a bank might have to make the payment.

37. Mr. AL-NASSER (Observer for Saudi Arabia) said that the observer for the Banking Federation of the European Community had drawn attention to a possible solution whereby the Commission must make it clear whether it was dealing with electronic transfers or traditional payment orders. In the case of documented paper orders, signature comparison would raise no problems, because the official receiving and executing the payment order would have the sender's signature and would be able to make the necessary comparison. In the case of electronic transfers, there were three possibilities: transfer by telephone, where there would always be a bank official who knew the originator and it would be difficult to imitate a voice; transfer by telegram, where the bank would request verification by the sender and the possibility of forgery was practically nil; and electronic payment orders, which could be compared with traditional payment orders. As indicated by the observer for Finland, forgery was one of the risks in the execution of payment orders, just as there was always a risk that banknotes might be forged.

38. Mr. ERIKSSON (Observer for Sweden) said that, in his opinion, the sender should be bound by article 4(1) only. He would therefore like to see the Finnish suggestion amended by the addition of words on the following lines: "The term does not include a method which contains merely comparison of a handwritten signature with a specimen". If that change were made he would be satisfied with the suggestion.

39. Mr. CONOBOY (United Kingdom) said that he would prefer not to deal with the issue under the definition of authentication, i.e., he would not favour changing a definition which had a reasonably wide internationally accepted meaning so as to exclude signatures. The matter should be dealt with in article 4.

40. He accepted the point made by the observer for Finland that the Model Law would change domestic law in some countries - possibly including his own. His delegation's views had been well expressed by the representative of the Union of Soviet Socialist Republics, and he welcomed the emphasis on the agreement between parties. He could see no justification for excluding handwritten signatures, which could be transmitted by electronic means and could even be written on a screen. Banks in the United Kingdom were already investing heavily in procedures for the electronic verification of signatures, and banks and their clients might well reach agreement in the future concerning electronic verification.

41. THE CHAIRMAN said that, regarding the allocation of the risk of forgery, it was common knowledge that the approaches adopted by common and civil law were in conflict. The Convention on International Bills of Exchange and International Promissary Notes provided a partial solution to the problem through its broad definition of the concept of "signature", but it was not yet in force.

42. The concern expressed by the representative of Finland that signatures were too easy to imitate to be admitted as a method of authentication was partly answered by the qualification "commercially reasonable" in article 4(2)(a) and 4(3). At any rate, it seemed clear that no reference to signatures should be included in the definition of "authentication" in article 2(j). That would not, of course, imply that signatures as a means of authentication were to be excluded.

43. Noting that the current text of the Model Law distinguished between the detection of error and identification of the source, he said it appeared that there was no support for the Canadian proposal to enlarge the definition of authentication to include the detection of error. In the absence of such support, the distinction between source and error issues would continue to be made.

44. Inviting consideration of article 2(k), he noted that the term "execution" was defined separately in article 2(1) and that that paragraph might be adjusted at a later stage in view of the proposal by the representative of Singapore to transfer to it the second sentence of article 2(f).

45. Ms. KOSKELO (Observer for Finland) said that the reference to article 10 might better be omitted from the definition of "execution date", since it was inappropriate to refer to substantive articles in a definition.

46. The CHAIRMAN reminded the Commission of the United Kingdom delegation's intention to propose a reference to a more specific paragraph of article 8 in connection with article 2(1).

47. U NYI NYI THAN (Observer for Myanmar) said he supported the Finnish suggestion that the reference to article 10 in article 2(k) should be deleted.

48. Mr. GREGORY (United Kingdom) said he had no strong feelings about the Finnish suggestion; his only theoretical objection to the inclusion in a definition of a reference to other provisions of a law would be on the grounds of circularity. In other words, one should not refer in a definition to a provision in the law which itself referred to that definition, but one might quite legitimately identify an idea by reference to the provision of the law in which it appeared, as in the current case.

49. There was, however, a more serious technical problem of circularity in connection with the concept of "execution date", a problem that was described in detail in his Government's comments on the Model Law (A/CN.9/347, p. 54, para. 3). The circularity of the Model Law's provision was due to the fact that, under article 4(6), a sender was not obliged to pay for a payment order until the execution date, but it was also implicit in article 10 that a

(Mr. Gregory, United Kingdom)

payment order did not have to be executed until it had been accepted while, under articles 6(2)(a) and 8(1)(a), acceptance did not take place until payment was received. Since the purpose of the Model Law was to ensure efficient credit transfer mechanisms, the Working Group had adopted the concept that a bank failing to act on receipt of a payment order was deemed to have accepted it if payment for the order had been received and would therefore incur obligations under the Law as a result of its failure to take action. His own and other delegations had submitted proposals to eliminate the technical problem of circularity with regard to the provisions in the current text relating to payment, execution and acceptance.

50. Furthermore, in most places where the terms "execution" and "execution date" appeared in the text, they were still in square brackets because final agreement had still to be reached on the definition of "execution" and, in particular, on its application to the beneficiary's bank.

51. The CHAIRMAN said that, in its comments contained in document A/CN.9/347, the United Kingdom Government proposed that the term "payment date" should be used only in article 10(1)(b) and be replaced elsewhere by the term "execution date". If article 10(1)(b) were then redrafted to include a definition of "payment date", the definition of the term in article 2(m) would become superfluous.

52. Mr. GREGORY (United Kingdom), noting that the Commission might wish to discuss the question separately, said that the use of the term "payment date" in the Model Law was problematic because payment orders often specified no payment date. The term should not, therefore, be defined by reference to a specific provision appearing in a payment order. Secondly, in many cases where the term appeared in the text, a reference to the "execution date" was more appropriate, particularly if the definition of "execution" were amended in the way his delegation suggested. Wherever it was genuinely appropriate to refer to a date specified in the payment order as the date when funds were to be placed at the beneficiary's disposal, that idea could be expressed in full. However, if the Commission felt that a definition of the term "payment date" would none the less be helpful, his delegation would not oppose its inclusion.

53. With regard to the definition of "execution", he wished simply to refer to his Government's proposals in paragraph 4 of its comments (A/CN.9/347, p. 54), in which the definition was adapted to include the beneficiary's bank. The Commission could take up one or other of two approaches: it could either invent a new term for making money available to the beneficiary through the beneficiary's bank or it could include that concept in the definition of execution. His delegation preferred the latter approach.

54. Mr. BHALA (United States of America) said that, on the question of whether or not a reference to article 10 should be included in the definition of "execution date", he shared the views of the representative of the United Kingdom. He did not agree, however, that the problem of circularity in connection with the provisions on payment, execution and acceptance was a

(Mr. Bhala, United States of America)

purely technical one. The underlying problem concerned the concept of "deemed acceptance", which the Commission might wish to consider at a later stage in connection with articles 6(2)(a) and 8(1)(a). In his delegation's view, the concept of "deemed acceptance", as it appeared in the current text, was objectionable and did nothing to promote the efficiency of credit transfer mechanisms or to facilitate trade.

55. His second concern was that the proposals on the current question would, if accepted, entail a wholesale and unnecessary revision of what was already a workable document.

56. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the Finnish suggestion that the reference to article 10 in the definition of "execution date" be deleted, because it introduced a condition into what should, by its very nature as a definition, be abstract and unconditional.

57. The CHAIRMAN said he took it that any decision by the Commission to delete or not to delete the reference to article 10 in article 2(k) would depend on the decision it reached concerning article 2(1).

58. Mr. LIM (Singapore) said that, if the Finnish suggestion that the reference to article 10 be deleted were accepted, the words "should execute" in article 2(k) would need to be changed to "is required to execute".

59. The CHAIRMAN said that the point would be considered when the text was being finalized.

60. He invited the Commission to consider article 2(1). The definition of "execution" in that subparagraph did not include action by a beneficiary's bank, because it had been assumed that the relationship between a beneficiary's bank and a beneficiary was outside the chain of credit transfers. Nevertheless, the drafting of the Model Law might be facilitated if the term "execution" could also be used with reference to action by a beneficiary's bank. He invited comments on that point.

61. Mr. ABASCAL ZAMORA (Mexico) said there was little point in defining execution by the beneficiary's bank, when article 17(1) stated that a credit transfer was completed when the beneficiary's bank accepted the payment order.

62. The CHAIRMAN said that a definition of "execution" which included action by the beneficiary's bank would make it possible to remove some square brackets throughout the text.

63. Mr. LE GUEN (France) said he agreed with the representative of Mexico. Moreover, he thought that any inclusion of action by the beneficiary's bank in the definition of "execution" would tend to reopen a discussion that had already been closed, regarding the time at which a transfer operation was concluded. The question of removing square brackets was a relatively minor one.

64. Mr. GREGORY (United Kingdom) said he thought it was agreed that the general approach was that the Model Law should not intervene between the beneficiary and beneficiary's bank. Nevertheless, some provisions in the Model Law did require the beneficiary's bank to make the money received available to the beneficiary, so that a term was needed to describe the action in question.

65. There would seem to be no danger in using the term "execution", on the understanding that it was not intended that the substantive provisions of the Law should intervene in the relationship between the beneficiary and the beneficiary's bank, except in the situations already agreed upon by the Working Group. Use of the term "execution" would not prejudice the rule in article 17(2) that a transfer would be completed when the beneficiary's bank accepted the payment order.

66. Mr. LOJENDIO OSBORNE (Spain) said it was questionable whether the fact that a credit transfer was completed when the beneficiary's bank accepted a payment order placed the relationship between that bank and the beneficiary outside the scope of the Model Law, particularly in the light of article 9 covering the obligations of the beneficiary's bank and the rights of the beneficiary. He could thus see no objection to the inclusion in the definition of a reference to action by the beneficiary's bank.

67. Mr. FUJISHITA (Japan) said he agreed with the comments made by the representative of the United Kingdom and supported the inclusion of a reference to actions by the beneficiary's bank in the definition. That was, however, a substantive point and not merely a drafting one.

68. Mr. SCHNEIDER (Germany) said he thought that the viewpoints of the representatives of the United Kingdom and France could be reconciled. While he was not opposed to mentioning action by the beneficiary's bank in the definition of execution, it should be made clear that the reference was to rules already included in the Model Law.

69. The CHAIRMAN assured the last speaker that the proposed change in subparagraph 1 was not intended to affect other rules in the Model Law.

70. Ms. KOSKELO (Observer for Finland) said she agreed with the representatives of the United Kingdom and Spain that certain provisions of the Model Law, such as articles 9 and 10, did apply to the beneficiary's bank and that that aspect should be covered in the definition.

71. Mr. BERGSTEN (Secretary of the Commission) explained that the earliest drafts prepared by the Secretariat had used the term "execution" in a sense which covered action by a beneficiary's bank because a number of policy decisions on that point had not yet been taken, particularly with regard to the extent that the Model Law should cover the relationship between a beneficiary and a beneficiary's bank. At a later stage, the general policy decision had been made that the effect of the Model Law would end when a beneficiary's bank accepted a payment order. The idea of execution by a beneficiary's bank thus became more problematic, but the term had been retained because the Working Group had not yet had occasion to consider that aspect.

(Mr. Bergsten, Secretary of the Commission)

72. A related problem was that some payment orders, such as SWIFT, did not specify a payment date. If a payment date was specified by the originator, it was a matter of interest not only to the beneficiary's bank and the beneficiary but also to the originator. That concern was reflected in article 10(1)(b).

73. Article 9(1) had been inserted because it was felt that the text would be incomplete if the entire idea was left out, in view of the end purpose of the activity. Without specifying when the beneficiary's bank would have to make funds available - except in cases in which a payment order designated a payment date - or how it should be done, article 9(1) had been added more or less pro memoria.

74. At the twenty-second session, a proposal had been adopted that execution should be defined, partly on systematic grounds, reinforced by the idea that the effect of the Model Law should stop at that point.

75. He himself was not arguing either for or against the point at issue. The Working Group had noted a number of passages in which the term execution would apply to the beneficiary's bank and square brackets had been added to bring those passages to the attention of the Commission.

76. The CHAIRMAN suggested that a drafting group, consisting of the representatives of the United Kingdom, Finland and Japan, should prepare a single text of the subparagraph for consideration at the afternoon meeting.

77. It was so decided.

The meeting rose at 12.40 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 444th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 12 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 2 (continued)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.20 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN invited the United Kingdom representative to report on the deliberations of the drafting group consisting of the delegations of Finland, Japan and the United Kingdom on a text for inclusion in the definition of the term "execution" in article 2(1), in respect of action by the beneficiary's bank.

2. Mr. GREGORY (United Kingdom) said that the group had extended the existing definition to cover action by the beneficiary's bank by adding a mention of the situations contemplated in article 8(1)(d) to (g) of the draft. The proposed wording took the form of the following additional sentence at the end of article 2(1):

> "With respect to the beneficiary's bank, "execution" means the doing of any of the following acts:
>
> (i) Crediting the beneficiary's account or otherwise placing the funds transferred at its disposal;
>
> (ii) Giving notice to the beneficiary that it has the right to withdraw the funds or use the credit;
>
> (iii) Applying the credit as instructed in the payment order received by the beneficiary's bank; or
>
> (iv) Applying the credit to a debt of the beneficiary owed to the beneficiary's bank or in conformity with an order of a court."

The text was lengthy, but the information which it conveyed would be located more appropriately in article 2 than in article 8, which could be shortened accordingly.

3. Mr. ABASCAL ZAMORA (Mexico) said that he saw no advantage in the definition proposed by the three-delegation group since it added nothing to what the draft already provided for determining the time when the beneficiary's bank should act. Under Mexican law, the most important role of the beneficiary's bank lay in acceptance of the payment order, and that was dealt with clearly in article 8. The notion of execution by the beneficiary's bank implied an obligation on the part of the beneficiary's bank, and to introduce it was to bring in something which, in the light of article 17(1), lay outside the scope of the Model Law. The definition raised difficulties and he could not accept it. Action by the beneficiary's bank would be examined under articles 9 and 10.

4. Mr. DE BOER (Netherlands) observed that the introductory wording of article 8(1) contained the words "at the earliest of the following times". He therefore thought it would be logical for the proposed additional sentence to refer to "the earliest of the the following acts".

5. Mr. BHALA (United States of America) felt that a definition of execution by the beneficiary's bank was needed since the definition to be adopted for the term "bank", or some equivalent, hinged on the question of execution. As a simpler alternative to the three-delegation proposal, he suggested the words "a beneficiary's bank executes an order by accepting the order". Acceptance was dealt with in article 8. His proposal would cover article 8(1) as a whole, whereas the three-delegation proposal covered only subparagraphs (d) to (g) of article 8(1).

6. Mr. RENGER (Germany) pointed to the contrast between the definition of the term "execution" proposed by the Working Group and the definition introduced by the United Kingdom representative, which included action by the beneficiary's bank. In his view, although the receiving bank was in a direct line of contractual action, it was debatable whether the beneficiary's bank was so obliged. There was a legal difference between executing a payment order and accepting one.

7. The CHAIRMAN pointed out that the beneficiary's bank was also a receiving bank.

8. Ms. KOSKELO (Observer for Finland) said that the three-delegation drafting group had been careful not to confuse the notions of acceptance and execution; the United States proposal, on the other hand, suggested that the two were the same thing. The aim of the drafting group had been to define execution by the beneficiary's bank in terms of certain acts which were tantamount to acceptance. Subparagraphs (a) to (c) of article 8(1) mentioned other acts which were to be construed as acceptance. As far as the beneficiary's bank was concerned, the group had referred solely to acts whereby the funds were made available to the beneficiary or the credit was applied. She strongly opposed the wording proposed by the United States because it would mean that acceptance could take place only through execution.

9. Mr. POTYKA (Observer for Austria) said that his delegation opposed the idea that acceptance by the beneficiary's bank should mean execution. It supported the view expressed by Germany. Austria saw an inconsistency between subparagraphs (d) to (g) of article 8(1) and article 9(1). It was illustrated best by the example that if the beneficiary's bank applied his credit in conformity with an order of a court, as contemplated in article 8(1)(g), it would be obliged, in accordance with article 9(1), to place the funds at the disposal of the beneficiary. That would obviously be forbidden by the court order.

10. Mr. BHALA (United States of America) said that it had not been his delegation's intention to confuse acceptance and execution. The definition proposed by the three-delegation group provided that the beneficiary's bank would execute the payment order when it accepted it in one of the ways set out in subparagraphs (d) to (g) of article 8(1). His delegation was suggesting

(Mr. Bhala, United States of America)

that the definition should cover in addition the conditions set out in subparagraphs (a) to (c) of article 8(1). It would be best for the reader to be confronted with a brief definition in article 2 and a more comprehensive list of situations in article 8(1).

11. The CHAIRMAN asked the United States delegation to express his views about subparagraphs (a) and (b) of article 8(1) in relation to the projected use of the word "execute", and also to explain how he saw article 9(1) in the context of execution. His own understanding of the discussion at the previous meeting was that, whatever the drafting group might suggest, execution would continue to mean conduct which brought into play the provision in article 9(1).

12. Mr. DUCHEK (Observer for Austria) said that he was disheartened to find that the Commission appeared to be adding complication to complication as the work went on, to the extent that the text of the draft was becoming unintelligible to those who had not worked on it from the start. He questioned the need for a definition of the term "execution"; the body of the text might be made sufficiently clear for one to be dispensed with altogether.

13. Ms. KOSKELO (Observer for Finland) agreed with the previous speaker that the text was becoming increasingly complicated; however, the value of a good definition was that once the term had been defined it could be used throughout a document without further explanation. She agreed too with the observer for Austria who had spoken earlier in the meeting that there was a discrepancy between articles 8(1) and 9(1). The latter provision would need to be amended.

14. The effect of the proposal by the representative of the United States would be that execution by a beneficiary's bank would be defined as acceptance. However, subparagraphs (a) to (c) of article 8(1) described events that might constitute acceptance but could not suffice to constitute execution of a payment order. The first of them was the so-called "deemed acceptance", contemplated in subparagraph (a); the position there was basically that acceptance took place after a certain lapse of time and when the funds had arrived at the beneficiary's bank - it was merely a matter of time and required no action on the part of the bank in order to occur. Next was the situation in which acceptance took place when the bank received the payment order, as provided in subparagraph (b); receipt alone could be construed as acceptance, but not as execution. Finally, article 8(1)(c) set out the rule that acceptance took place when the receiving bank notified the sender of acceptance, meaning that it occurred when the beneficiary's bank took action towards the sender of the payment order; execution, however, must surely relate to the beneficiary and not to the sender. Her delegation took the view that execution could be deemed to have taken place only when funds were placed at the disposal of the beneficiary or when the credit received was otherwise applied for his benefit.

15. Mr. AL-NASSER (Observer for Saudi Arabia) said that in attempting to define execution the Commission appeared to be seeking a solution to that problem by linking it to another one, namely time of execution. A simple proposal which avoided that pitfall was that execution should be defined as the commitment by the beneficiary's bank to accept the payment order.

(Mr. Al-Nasser, Observer for Saudi Arabia)

16. The observer for Finland had indicated that actual execution took place when funds were credited to the beneficiary's account at his bank, but in his view agreement by the beneficiary's bank to implement a payment order meant crediting the money to the account of the beneficiary.

17. The CHAIRMAN said that he concluded from the discussion that neither the wording suggested by the drafting group nor that proposed by the United States would command acceptance. The observer for Finland had suggested that article 9(1) should be amended, but his own feeling was that the Commission might go beyond the intent of the Model Law if it deviated too far from the existing text of that provision.

18. Mr. ADEDIRAN (Nigeria) suggested that an analysis be made of what was said in article 9 in respect of domestic law, and the results used as a guide.

19. Mr. HUANG Yangxin (China) proposed the addition to article 2(1) of a sentence reading: "With respect to the beneficiary's bank, 'execution' means actions taken by the beneficiary's bank in order to place funds at the disposal of the beneficiary after acceptance of the payment order."

20. The CHAIRMAN asked the representative of China whether he felt that the phrase "after acceptance of the payment order" was strictly necessary. If not, his proposal would come very close to that of the drafting group.

21. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's thinking had much in common with that of the delegation of Austria. Execution needed defining in respect of articles 8(1) and 10. It was not until those articles had been looked at that it was possible to know whether a definition of the term "execution" was needed. He would like to see the drafting group's proposal held over until that time.

22. Mr. BURMAN (United States of America) supported the Mexican suggestion. His delegation would reply later to the questions put to it by the Chairman and hoped that its answers might help the Commission to deal with some of the points raised by the observer for Finland and other speakers.

23. Mr. GREGORY (United Kingdom) also supported the suggestion made by the representative of Mexico. If the matter was put to one side it might well be found later that no definition of the term "execution" was needed. The Working Group had managed without one until its twenty-second session the previous December. He agreed with the observer for Austria about the danger of drafting a text which could be understood only by its authors. There was a good case for the Model Law to use the word "execute" in its ordinary meaning and leave its interpretation to individual legislators. Further consideration of the substantive matters dealt with in articles 8, 9 and 10 would be required. He pointed out that the three-delegation drafting group had been very mindful of the importance of keeping the notions of execution and acceptance separate. In certain factual situations, however, the two operations took place simultaneously. There was certainly some potential for confusion if acceptance had not taken place by the time that execution occurred, because acceptance would then mean that the bank must execute.

24. The CHAIRMAN said he felt that the Commission had reached a tentative conclusion. It had possibly been optimistic in seeking to extend the definition of the term "execution" to include action by the beneficiary's bank. There were good reasons for the wording of the definition as it stood. Since the Model Law utilized notions of acceptance and execution in relation to the same conduct simultaneously, it became difficult to maintain the distinction between them, but the basic framework of the Model Law would collapse if they were merged. When the Commission came to consider article 6(2)(d), concerning the issuing of a payment order intended to carry out the payment order received, it could consider further whether the definition of the term "execution" in article 2(1) was really necessary.

25. To sum up, as far as the attempt to define "execution" with respect to the beneficiary's bank was concerned, it had become evident from the discussions that it was difficult to draft an appropriate definition without risking the confusion he had mentioned between the notions of "execution" and "acceptance", and without going beyond the limit that had been established for the matters to be governed by the Model Law under the line of demarcation represented by article 9(1). He therefore suggested that the Commission should decide to do without a definition of "execution" with respect to the beneficiary's bank. He further suggested that the definition of "execution" in article 2(1) (in relation to a receiving bank other than the beneficiary's bank) should be retained for the time being, with the understanding that some drafting change would be needed to make it clear that there was no intention to confine the term "execution" to receiving banks other than the beneficiary's bank.

26. It was so agreed.

27. The CHAIRMAN invited the Commission to take up subparagraph (m) of article 2. In relation to that subparagraph, there was a written proposal from the United Kingdom to delete the definition (A/CN.9/347, pp. 54-55). The United Kingdom proposed that where the term "payment date" was used in the draft it should be replaced by the term "execution date", except in article 10(1), and that in article 10(1) its meaning should be spelt out, making a definition of "payment date" unnecessary.

28. The Commission might also wish to consider the question of terminology discussed in paragraph 67 on page 23 of the Secretariat's comments (A/CN.9/346).

29. Mr. DE BOER (Netherlands) supported the proposal to delete subparagraph (m) and do without a definition of "payment date" in article 2.

30. The CHAIRMAN noted that it might not be necessary to use the term "payment date" even in article 10(1). If the United Kingdom proposal in document A/CN.9/347 was adopted, article 10(1)(b) would begin: "the order specifies a date when the funds are to be placed at the disposal of the beneficiary".

31. Mr. LIM (Singapore) supported the United Kingdom proposal.

32. The CHAIRMAN said he took it that there was agreement that subparagraph (m) of article 2 should be deleted, on the understanding that its substance would be incorporated in article 10(1)(b) when that provision was taken up.

33. It was so decided.

34. The CHAIRMAN invited the Commission to consider proposals for adding further definitions to article 2. Three additional definitions had been proposed by the United States of America (A/CN.9/347/Add.1, pp. 12-13).

35. Mr. BHALA (United States of America) said that the United States had proposed the addition of definitions of the terms "credit transfer system", "interest" and "revocation". If the Commission decided to replace the term "bank" in article 2(f) by a term such as "credit transfer entity", it might be necessary to use some term such as "payment management system" instead of "credit transfer system". The additional definitions were proposed in the interests of clarity, certainty and predictability.

36. The proposed definition of "interest" was based on the Guidelines on International Interbank Funds Transfer and Compensation of the International Chamber of Commerce (ICC). Interest was a frequently litigated issue and the Commission should not leave its meaning in doubt.

37. Mr. AZZIMAN (Morocco) said that his Government had pointed out in its written comments (A/CN.9/347/Add.1, p. 7, sect. 2) that the term "purported sender" was not defined in the Model Law. If other delegations also felt that the term required explanation, a definition of "purported sender" could perhaps be included in article 2(e) in combination with the definition of "sender".

38. The CHAIRMAN suggested that the point should be taken up under article 4. There were some proposals for amendments to that article; the Commission could keep in mind the point raised by the Moroccan delegation and come back later if necessary to the question of a possible definition.

39. Mr. ABASCAL ZAMORA (Mexico) pointed out that his Government's written comments in document A/CN.9/347 (p. 43) contained a proposal which included a definition of the term "interest". The proposed definition reproduced practically verbatim the definition in the ICC Guidelines. In the Working Group, his delegation had been hesitant to accept such a definition of interest, but now that the authorities in Mexico had had an opportunity to study the Guidelines his Government was in favour of including a definition of interest based on them. His delegation therefore agreed with the idea behind the United States proposal, though there were some textual differences between the definition proposed by Mexico and that proposed by the United States.

40. Mr. CONOBOY (United Kingdom) said that there should be a definition of interest; the problem lay in reconciling the proposals made by the delegations of the United States and Mexico. The United States proposal defined interest as the interbank rate of interest in the currency of the State in which the receiving bank was located, whereas the Mexican proposal defined it as the

(Mr. Conoboy, United Kingdom)

time value of the transaction amount in the country of the currency involved. If that time value referred to the currency of the payment order, it might not be the same as the interbank rate of interest in the currency of the State in which the receiving bank was located. As he understood it, the ICC Guidelines corresponded to the Mexican proposal, so that the determining factor would be the currency.

41. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's proposal drew on the ICC definition, while the preference of the United States delegation was to refer to the interbank interest rate. The difference lay in the degree of flexibility afforded by the ICC approach, which clarified the definition of interest by introducing the notion of time value.

42. The CHAIRMAN said that it was not clear from the Mexican proposal whether the currency used as the unit of account or the currency used for payment should be taken as the basis for calculating interest.

43. Mr. ABASCAL ZAMORA (Mexico) said that he would welcome some time in which to consider that point.

44. Mr. BHALA (United States of America) said that the ICC definition was the following: "Interest is the time value of the transaction amount in the country of the currency involved. Interest compensation shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country". The text thus differed from the Mexican proposal only in referring to "interest compensation".

45. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of the French text of the ICC definition referred to "dommages-intérêts".

46. Mr. LE GUEN (France) said that rates of interest varied with currency fluctuations, but that was obviously a factor which was of concern to the beneficiary rather than the sender. The United States definition and the definition derived from that of ICC both linked interest to the currency of a given country, but he wondered how that formula could take into account the ECU, which was not tied to any particular country. He pointed out that the ICC recommendations related exclusively to interbank transfers of funds, whereas the Model Law also made provision for payment of interest to originators or beneficiaries which were not necessarily banks.

47. Mr. BHALA (United States of America) said that the Commission's prime concern should be to arrive at a predictable and uniform Model Law. It might help in drafting a definition if it was borne in mind that the currency of the credit transfer might not be the same as that of the country in which the receiving bank was located. In practice, however, that might not prove to be a significant consideration. If interest compensation was paid, the parties to the credit transfer, either the originator or the beneficiary, might prefer compensation in a particular currency, so that the ICC definition might prove to be more workable.

(Mr. Bhala, United States of America)

48. With regard to the ECU, he said that the text of the definition could accommodate the concern voiced by the representative of France by referring to "units of account".

49. Mr. ABASCAL ZAMORA (Mexico) said that it was his impression from the discussions in the Working Group that the only interest rate which would be generally acceptable was the interbank interest rate. With regard to the term "units of account", he suggested that his delegation and that of the United States might jointly work out an agreed formulation to be submitted to the Commission.

50. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation favoured the wording derived from the ICC definition, as reflected in the proposal of Mexico.

51. Mr. HERZBERG (Observer for Israel) agreed with the previous speaker.

52. Mr. SCHNEIDER (Germany) said that the Mexican proposal was one of the options available to the Commission. Another was to refrain from defining "interest" altogether, while a third was to leave it to the countries adopting the Model Law to establish a precise percentage for interest payable as compensation.

53. Mr. CONOBOY (United Kingdom) said that his delegation would prefer a definition modelled on the ICC definition and therefore based on the interbank interest rate applicable to the currency of the transfer.

54. Mr. BURMAN (United States of America) said that his delegation's proposal was intended to prevent litigation by harmonizing national legislation in the field of interest rates. It believed that a definition would be essential for that purpose.

55. Mr. BERGSTEN (Secretary of the Commission) said that the issue raised by the definition of "interest" should be considered in the light of article 16, which related to liability and damages.

The meeting rose at 5.10 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 445th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 13 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that the ad hoc drafting group would, at a later stage, present drafts of article 2(a) and (f) for the Commission's consideration. He hoped that they would entail only minimal changes so that it would not be necessary to await translation and the issue of conference room papers before they were discussed.

2. Mr. BERGSTEN (Secretary of the Commission) said he felt that, at the current, final, stage of negotiations, translation and the issue of conference room papers would be necessary, even if the new texts involved only minor changes.

3. The CHAIRMAN said he agreed that translation would have to be awaited if substantive changes were made. The official drafting group would, in any case, compare all the language versions in order to ensure consistency.

4. Mr. BURMAN (United States of America) proposed that a third sentence be added to article 2(f) to read: "An entity that is a payments management system is not to be taken as executing payment orders, including a wire transfer network, automated clearing house, or other communications system which transmits payment orders on behalf of its participants."

5. That amendment would meet the concern expressed by members of the Commission in that it would exclude from the definition of a "bank" such systems as INTELSAT and SWIFT.

6. Mr. LE GUEN (France) said that he would have to await a French version of the United States amendment before commenting upon it. Under French law, bodies managing payments such as automatic clearing houses were considered to be banks; the elimination of all such institutions would go beyond a simple change in terminology and would run counter both to French legislation and to current international thinking with regard to the organization of the interbank netting system.

7. Mr. SOLIMAN (Egypt) said he thought that the word "bank" was so firmly established that it might well be retained.

8. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the representative of Morocco had, on the previous day, remarked that the term "purported sender" was used in article 4. The term should be defined in article 2.

9. The CHAIRMAN said that that was a separate proposal.

10. Mr. BURMAN (United States of America) said he thought it would be misleading to expand the term "bank" to include a large number of non-banks.

11. It was interesting to hear that, under French law, bodies transferring funds were regarded as banks, but that was not the case in his own country. His delegation had proposed at an earlier stage that the Working Group should consider the possibility of incorporating the funds transfer system as an integral part of the text and recognizing fund transfer systems as parties. Had that course been adopted, he would have agreed with the representative of France that it was necessary to take such institutions into account in the definition of the fundamental entities to be covered.

12. However, that proposal had been rejected, partly because it would have complicated the text and led to a number of structural changes. It was probably too late for the Commission to consider including such entities, though a working group might examine the question.

13. Mr. ERIKSSON (Observer for Sweden) said he thought that a wording was needed which met the concerns of the United States delegation without creating problems for others. That might, perhaps, be achieved by deleting article 2(f) and by inserting somewhere in article 2 a new sentence to the effect that what was said in the Model Law concerning banks also applied to other entities which, in the normal course of business, engaged in executing payment orders in a way similar to that of banks. It was a somewhat looser definition, but would allow all countries to interpret it in a way that might be helpful to them.

14. The CHAIRMAN pointed out that the Swedish suggestion was contrary to a decision that had already been taken.

15. Mr. HERZBERG (Observer for Israel) said that the emphasis in the definition of a bank was on debiting and crediting operations. The SWIFT system and clearing houses and other institutions were mere transmission agencies. It might suffice if it were made clear that the definition of "execution" referred only to debiting and crediting.

16. Mr. BISCHOFF (Observer for Switzerland) said he was somewhat disturbed by the United States proposal. He thought that there had been a consensus that the entities responsible for transmitting payments should not be subject to the Model Law. If the definition of the term "bank" were expanded in accordance with the United States proposal, some new elements would be introduced into the payment chain. The SWIFT system had not hitherto been considered as subject to the Model Law since it merely transmitted messages. The Swiss Interbank Clearing Institution was managed by a commercial company, but the debits and credits were carried out by the national bank. His delegation was therefore opposed to the United States amendment.

17. Mr. BURMAN (United States of America) said that his delegation did not wish to change the definition of a "bank". Indeed, if the word "merely" in the second sentence of article 2(f) were construed in a broad sense, he would have no problem with it. His concern was that computer-based interbank systems such as SWIFT, CHIPS and INTELSAT did more than merely transmit

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payment orders although they did not execute them. As the Commission had decided to expand the definition of a "bank", it must ensure that it did not unintentionally include such entities as data management systems. He was concerned that, if the Model Law did not accommodate future developments in banking practice, it might come to be regarded as a relic of the pre-computer age.

18. The CHAIRMAN said he quite understood the concern of the representative of the United States of America that entities which merely transmitted payment orders should not be included in the definition of a "bank". In fact, the Commission had already accepted that entities which did not in the ordinary course of business execute payment orders were not banks. However, the Commission, while accepting the purpose of the United States representative, seemed to have difficulty in accepting the language he had proposed.

19. Mr. BURMAN (United States of America) said that his delegation had hoped that the Commission would not produce a Model Law that was already antiquated but would prepare for future changes arising from the new electronic methods of commerce. Those engaged in future litigation would rely, not on any commentary, but on the language of the Law itself, so it was that language which was the key.

20. Mr. BERGSTEN (Secretary of the Commission) said that the basic problem was that entities engaged in credit transfers were not necessarily traditional banks. The first sentence of article 2(f) attempted to define a "bank", while the second sentence of that subparagraph was intended to ensure that the broad definition of a "bank" did not include entities such as mere transmission systems or clearing houses. There was no disagreement among the members of the Commission that mere transmitting entities, such as a telex service or SWIFT, should be excluded.

21. The representative of the United States of America wished expressly to exclude clearing houses, while the representative of France had some reservations in that regard. In fact, there were different types of clearing houses: the traditional clearing house received a message, recorded the amount received from the sender and the amount sent to the recipient, sent the message and netted off; entities such as FEDWIRE, however, did not undertake a netting operation but maintained a special account which was debited or credited.

22. He thus distinguished three types of entity: firstly, the merely transmitting entity not covered by the Model Law; secondly, the traditional netting clearing house which, he believed, should not be covered by the Model Law either; and, thirdly, the type of clearing house where there was both transmission and debiting and crediting of accounts. The latter, in his view, should be covered. It was for the Commission to decide, however, which of the three types of entity he had described should be excluded from the definition of a "bank".

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23. The new third sentence which the United States representative proposed should be added to subparagraph (f) of article 2 was an alternative way of defining the entities which were not banks, namely, by listing them. It was for the Commission to decide whether the exclusion of such entities could be achieved by a definition, as in the case of the existing draft text of subparagraph (f), or by a listing of the excluded entities.

24. The CHAIRMAN said that the Commission had already agreed on the definition of a "bank", and thus on the scope of the Model Law which, he assumed, was acceptable to members in terms of the conditions in their own countries. In his view, therefore, the existing text had the flexibility to accomodate variations around the world and changes in the future.

25. Mr. LE GUEN (France) said his delegation agreed that mere transmitting entities, even where there was an element of value added, such as SWIFT, should be excluded from the definition of a "bank". A blanket exclusion of automated clearing houses would, however, be dangerous, since, even if they had not yet engaged in banking activities, they might well do so in the future.

26. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that the main concern was not so much to define a "bank", as to ensure that the Model Law applied to as wide a range of credit transfers as possible. A more comprehensive term for "bank" was needed in order to accommodate all the entities which legally executed payment orders.

27. Mr. GREGORY (United Kingdom) said that, while it was important that the Model Law should be up to date, there was a danger that, if it defined future conditions too precisely, it might rapidly become out of date, as the representative of France had rightly suggested.

28. The suggestion by the observer for Sweden was not without merit. His own delegation therefore proposed that both subparagraph (f), defining a "bank", and subparagraph (k), defining "execution", should be deleted. That would leave those words with their ordinary meaning, to be interpreted by the courts.

29. However, the Commission had taken a policy decision on the scope of the Model Law by treating as banks those entities which, as an ordinary part of their business, engaged in executing payment orders. He therefore proposed the addition of a second sentence to article 1(1) which would read: "It applies to other entities that, as an ordinary part of their business, engage in executing payment orders as it applies to banks".

30. It was not necessary to define "execution", because the subject of the Model Law was itself the execution of payment orders. Judges could turn to the substance of the Law to determine if an entity was engaged in a banking activity.

31. Mr. BURMAN (United States of America) said that the United Kingdom proposal offered a possible solution. The intent of the Commission to exclude certain types of transmitting entity would still need to be reflected in the

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commentary. He accepted the point that what was new today could be out of date tomorrow.

32. Mr. KOMAROV (Union of Soviet Socialist Republics) said he liked the United Kingdom proposal. It was a possible solution in view of the nature of the instrument and the conditions it was intended to address.

33. Mr. LIM (Singapore) also supported the United Kingdom proposal. In the context of a Model Law - which was not a convention - the definition of a "bank" was best left to national legislation. His own Government would have been unable to accept the definition in article 2(f).

34. Mr. ABASCAL ZAMORA (Mexico) said that the United Kingdom proposal, if he had understood it aright, might give rise to drafting problems, because the Commission would have to decide what to do about the terms "receiving bank", "intermediary bank", "beneficiary's bank" and "executing bank".

35. Mr. GREGORY (United Kingdom) explained that his proposal would, in effect, move the relevant words from the definition of "bank" to article 1(1). He did not think that it would be necessary to make any change in expressions such as "receiving bank", "beneficiary's bank" and so forth, because the initial rule would make it clear that, where such expressions were used, they would apply to any other entity that was in the same position.

36. Mr. BURMAN (United States of America) suggested that the words "as it applies to banks" should be removed, since they might give the impression that other entities were expected to comply with the same regulations and requirements as banks.

37. Mr. GREGORY (United Kingdom) said that he did not think those words bore such an implication, because the Model Law was concerned with credit transfers. They were probably not essential - although they made the provision read more smoothly - and the effect would no doubt be the same if they were omitted.

38. Mr. AL-NASSER (Observer for Saudi Arabia) suggested, as a possible improvement on the United Kingdom amendment, that article 1(1) should read: "This law applies to credit transfers where a sending bank and its receiving bank are in different States, as well as to other entities which can be regarded as banks in accordance with the legislation of each State."

39. The CHAIRMAN pointed out that that wording would not be in keeping with the Commission's decision to broaden the scope of the Law's application to all entities which engaged in executing payment orders as an ordinary part of their business.

40. Mr. ERIKSSON (Observer for Sweden) suggested, as an alternative which might solve the problems of the United States representative, that the proposed second sentence in article 1(1) might begin with words on the

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following lines: "What is stated in this model law concerning banks applies also to other entities which, as part of their business, engage in executing payment orders."

41. Mr. GREGORY (United Kingdom) thanked the observer for Sweden for his suggestion - although the words "In this law, references to banks include other entities which, as an ordinary part of their business ..." might be more consistent with English legislative style. However, the suggested wording might cause other problems if it were interpreted as meaning that the other entities were, in some way, banks. If neutral words were used, the Law would apply to other entities, particularly if the words at the end "as it applies to banks" were deleted, so as to dissociate the banks and the other entities.

42. Mr. LOPEZ ROCA (Observer for Colombia) said that, if he had understood it correctly, the earlier Swedish suggestion would meet one of the problems of the Mexican representative but would still not solve the problem of what to do with the definitions of "receiving bank", "intermediary bank" and so forth, because the definitions would then apply to the entities which were banks. The statement that the Law was applicable to banks and also to other entities did not mean that any reference to banks should be understood as including other credit transfer entities. However, the latest Swedish suggestion that a reference in the Model Law to banks also meant a reference to other entities dealing with credit transfers might be the solution.

43. Mr. ABASCAL ZAMORA (Mexico) said that the Commission seemed to be engaged in drafting rather than in discussing substance. The insertion of a definition in an article which established the sphere of application of the Law rather than in its natural place, the article on definitions, would make the Law complex and difficult to read. The basic problem facing the Commission was to identify what was meant by the word bank or whatever replacement word it chose. The Commission must find a clear definition and be itself clear about the functions of those entities that were to be called banks.

44. So far it had reached agreement that clearing houses, messenger systems and fund transfer systems should be eliminated - although the situation might change in the future. He therefore proposed that the Commission should take note of the proposals made by the United Kingdom representative and of the United States delegation's objections to the word "merely" and ask an informal drafting group to produce a text. Drafting in the Commission itself would only make the issue more complicated.

45. The CHAIRMAN said that the Commission was still discussing substance. He asked whether it accepted the United Kingdom approach, namely, to eliminate the definition of "bank", which was a source of controversy. The term "bank" would thus not be defined, but the proposed additional sentence to article 1(1) would clarify what was meant and would give it a broader scope than the definition in article 2(f).

46. It was so agreed.

47. The CHAIRMAN suggested that the representatives of Singapore, the United States and the United Kingdom and the observer for Sweden might be asked to prepare a text for consideration by the Commission as soon as possible, without expanding or enlarging the substance in any way.

48. It was so decided.

49. Ms. KRAG JORGENSEN (Denmark) said that she favoured the Swedish and United Kingdom wordings and agreed with the underlying approach. However, after listening to the debate and examining the new text proposed by the United Kingdom delegation, she found that it left a gap in the application of the Model Law. She was raising the point as a matter for reflection. The Model Law would apply to banks and other entities which, as an ordinary part of their business, engaged in executing payment orders, the criterion being "as an ordinary part of their business". She wondered, however, whether entities which engaged in executing payment orders, not as an ordinary part of their business but from time to time should be excluded from the sphere of application of the Model Law.

50. U NYI NYI THAN (Observer for Myanmar) said that, in a traditional Asian society, there were forms of credit transfer by wholesale trading houses, dealing in potatoes or onions or the like, which were more efficient than the State banks.

51. Mr. VASSEUR (Banking Federation of the European Community) said that article 1(1) had been extended to cover entities other than banks and the United States representative had referred to transmitting entities, such as SWIFT, which normally transmitted messages only but could, on occasion, do more. On behalf of his Federation, he would like a written assurance that such entities, whose main function was to transmit messages, would not be covered by the Model Law, since they did not execute payment orders in the sense understood by the Model Law.

52. The CHAIRMAN said that it was clear that SWIFT, as it currently operated, would not be covered by the Model Law, and he did not think that any speaker had said that it would. The United States representative had said, when justifying his proposal, that there might be doubts, but no one else had agreed. The observer for the Banking Federation could rest assured, therefore, that it was the understanding of the Commission that transmitting entities, such as SWIFT, would not, as they currently operated, be covered by the Law.

53. In reply to the representative of Denmark, he thought that the words "as an ordinary part of its business" were subject to interpretation. In some cases, entities which engaged in executing payment orders from time to time might be included in the scope of the Model Law.

54. Ms. KRAG JORGENSEN (Denmark) said that a possible solution to the problem of the Model Law's sphere of application would be to state that it applied to banks and other entities "whenever they engaged in executing payment orders".

55. The CHAIRMAN said that, although the phrase "as an ordinary part of its business" could not be omitted, it could be interpreted quite broadly.

56. Mr. AZZIMAN (Morocco) said that the term "purported sender" actually appeared for the first time in article 2(j). He would have no objection, however, if its meaning were clarified later in article 4.

57. The CHAIRMAN said that a decision as to whether or not a definition of the term was needed could be taken when article 4 was being discussed. If its meaning was made sufficiently clear in article 4, a definition could be dispensed with.

58. Mr. BERGSTEN (Secretary of the Commission) said that it had become apparent when the Secretariat's comments were being prepared (A/CN.9/346) that a problem of definition might arise with respect to the term "beneficiary's bank": the question was whether the "beneficiary's bank" was the bank named as such in the payment order sent to that bank or the bank named by the originator. Before dealing with that problem, however, the Commission might first wish to discuss the substantive issues raised in later provisions, particularly in articles 13, 14 and 17.

59. The CHAIRMAN said that, if the Commission was able to accept the interpretation given in the Secretariat's comments (A/CN.9/346, p. 48, para. 8, and p. 91, paras. 4 to 6), it might be unnecessary to define the term "beneficiary's bank".

Article 3

60. The CHAIRMAN said that two approaches to article 3 were possible, the first being the one adopted in the current text and the second, and opposite, approach being a provision along the lines of: "except as otherwise provided in this law, no agreement is possible on the rights and obligations of a party to a credit transfer".

61. If the first approach was adopted, it would be understood that only articles 1 and 2 were not capable of variation whereas, if the second approach was favoured, parties would be able to change only those provisions which were specified by the Model Law as being capable of variation. It should be borne in mind, in that connection, that the approach favoured by the Commission would have a bearing on its consideration of each subsequent provision of the Law.

62. Mr. GREGORY (United Kingdom) said that, as was clear from his Government's comments (A/CN.9/347, pp. 55-56), his delegation tended to favour the second approach. It thought, moreover, that the Law should not only indicate which provisions were capable of variation, but also which provisions should be given mandatory force. Discussion of that matter would inevitably involve questions of substance as well as drafting.

63. While English common law enshrined the principle of freedom of contract, it was clear that, in the case of the Model Law, such freedom should be constrained in a number of instances to ensure the smooth operation of the mechanism of international credit transfers. It was essential to preclude

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situations in which an agreement to vary the provisions of the Law might detract from the rights of other parties to a credit transfer that were not parties to the agreement.

64. Mr. VASSEUR (Banking Federation of the European Community), referring to the Federation's comments on the matter in question (A/CN.9/347, p. 67), said he endorsed the remarks made by the representative of Germany and the observer for Switzerland in support of greater contractual freedom. It was the unanimous view of all the banking associations making up the Federation that practice should evolve according to need. Since there was as yet no specific legislation in the European Economic Community governing international credit transfers, such transactions were currently subject to freedom of contract, a principle which might be restricted by the Model Law.

65. The European Commission, which had carried out studies on methods of payment in the European internal market, had unofficially indicated that it might well adopt as a directive the text produced by the Commission. That was the reason for his Federation's particularly keen concern that the Model Law should not lead to the adoption of provisions which could confuse banking operations and create serious difficulties.

66. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had decided to enshrine the principle of freedom of choice, as one might expect in an area of the law concerning private relations, and to review each article separately to determine whether or not such freedom could be preserved. He did not share the concern of the United Kingdom delegation that an agreement to vary the provisions of the Model Law might affect the rights of other parties, since a contractual agreement between an originator and his bank could not create rights and obligations for parties not bound by the agreement.

67. The CHAIRMAN said that there seemed to be a general trend in the Commission towards adopting the first of the two approaches he had mentioned and examining each provision in the light thereof.

68. Mr. BHALA (United States of America) said he was not convinced by the argument put forward by the United Kingdom representative to the effect that freedom of contract should be restricted if the rights and obligations of other parties might be affected. The Model Law was, after all, intended to deal with that precise subject of rights and obligations, and the parties to credit transfers should be allowed to vary such rights and obligations as they deemed fit. Any approach not allowing for freedom of contract and flexibility in the market-place was doomed to become increasingly out of date.

69. As for the Commission's procedural approach to the matter, he would prefer that it retain freedom of contract as a basic rule rather than examine each provision to determine whether such freedom should be retained or omitted.

The meeting rose at 12.40 p.m.